No. 90-248

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SAN FRANCISCO FIRE FIGHTERS LOCAL 798,
INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, AFL-CIO,
Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,
FONTAINE DAVIS, *et al.*,
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether "strict scrutiny" rather than "abuse of discretion" should be the standard of appellate review in appeals by adversely affected nonminority employees of consent decrees which require municipal employers to grant preferences to women and minorities in hiring and promotions.

2. Whether the relevant labor market for purposes of establishing a *prima facie* case of employment discrimination in the San Francisco Fire Department is the population of the City and County of San Francisco rather than the population of the Standard Metropolitan Statistical Area.

3. Whether a consent decree may require a municipal employer to grant promotions to minority employees who have not demonstrated through competitive examinations that they possess the minimum qualifications for civil service appointments to those positions.

4. Whether it was error to approve a consent decree that was not narrowly tailored to remedy past discrimination, but was instead manifestly designed solely to establish and maintain a balance between the number of females and minorities in each rank of the San Francisco Fire Department and the number of females and minorities among residents of the City and County.

PARTIES

The petitioner in this action, San Francisco Fire Fighters Local 798, International Association of Fire Fighters, AFL-CIO ("Local 798"), is a labor union that represents the members of the San Francisco Fire Department. Local 798 was an intervenor at the District Court. Respondent City and County of San Francisco ("City and County" or "City"), a defendant below, is a California municipal corporation. Respondents Fontaine Davis, Eric H. Washington, Jerilyn North, Robert L. Demmons, Jimmie Braden, Audry Lee, Early Davis, Brandi Swanson, Susan Moorehead, Anne Young, Mary M. Carder, Theresa Rodigou, Kathleen J. Bradshaw, Patricia Murray, International Association of Black Firefighters—San Francisco Chapter, Chinese for Affirmative Action, and the Mexican American Legal Defense Fund (collectively "the *Davis* plaintiffs"), plaintiffs and plaintiff-intervenors below, are applicants for employment, employees, or representatives of employees of the San Francisco Fire Department. Respondent City and Respondents Fontaine Davis, *et al.*, are parties to the consent decree that is the subject of this petition. Respondent United States of America, a plaintiff below, is not a party to the consent decree. The United States filed an appeal of the District Court order approving the consent decree but elected not to pursue that appeal.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner San Francisco Fire Fighters Local 798, International Association of Fire Fighters, AFL-CIO ("Local 798") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on December 4, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at *Davis v. City and County of San Francisco*, 890 F.2d 1438 (9th Cir. 1989), unofficially reported at 51 FEP Cases 1542, 52 EPD ¶ 39,498, and 15 F.R.Serv.3d 782, and is reprinted in the Appendices to this Petition at pages 1a-27a. An unreported order of the Ninth Circuit denying Local 798's petition for rehearing and sug-

gestion for rehearing *en banc* is reprinted in the Appendices to this Petition at pages 140a-145a. The opinion of the United States District Court for the Northern District of California is officially reported at *United States of America v. City and County of San Francisco*, 696 F.Supp. 1287 (N.D.Cal. 1988), unofficially reported at 51 FEP Cases 1500 and 47 EPD ¶ 38,182, and is reprinted in the Appendices to this Petition at pages 28a-103a. The consent decree which is the subject of this Petition is an appendix to the latter opinion. It is set forth at 696 F.Supp., pp. 1311-1323 and is reprinted in the Appendices to this Petition at pages 78a-103a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 4, 1989. A timely Petition for Rehearing with Suggestion for Rehearing En Banc was filed on December 26, 1989. The Petition for Rehearing was denied on May 9, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves the Fourteenth Amendment to the United States Constitution and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* The Fourteenth Amendment to the United States Constitution states in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title VII provides in pertinent part:

> § 2000e-2. Unlawful employment practices
>
> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .
>
> § 2000e-5. Enforcement Provisions
>
> (g) . . . No order of the court shall require . . . the promotion of an individual as an employee who was refused . . . advancement . . . for any reason other than discrimination . . . .

STATEMENT OF THE CASE

On November 2, 1984, the United States District Court for the Northern District of California entered an order dismissing an action brought by the San Francisco Chapter of the International Association of Black Firefighters and several individual applicants and employees alleging racial and sexual discrimination in hiring and promotional practices of the San Francisco Fire Department.

That action, *Fontaine Davis, et al. v. City and County of San Francisco, et al.*, No. C-84-1100 MHP ("*Davis*"), challenged a 1978 promotional examination for the rank of Lieutenant that was already the subject of pending state court litigation (*City and County of San Francisco v. Fair Employment & Housing Comm'n*, 191 Cal.App.3d 976 (1987)). It also challenged two other civil service examinations. One was an entry-level examination that had been administered in 1982. The second was a promotional examination for the rank of Lieutenant that had been administered in 1984. Although these examinations had been completed, the San Francisco Civil Serv-

ice Commission was advised by the City Attorney's office not to certify resultant lists of persons eligible for appointment because the entrance examination disproportionately excluded female applicants and the Lieutenant examination disproportionately excluded Black applicants.

In dismissing the *Davis* action, the District Court held that the plaintiffs' claim against the 1978 promotional examination for the rank of Lieutenant should be stayed pending the outcome of the related state court litigation, and that the plaintiffs' claims against the 1982 entry-level examination and the 1984 Lieutenant examination should be dismissed as premature, since no civil service lists had yet been adopted.

On November 13, 1984, less than two weeks after the dismissal of *Davis*, the United States commenced the instant action, which also challenged the 1982 entry-level examination. Shortly thereafter, the United States and the San Francisco City Attorney's office announced a proposed consent decree. Under this proposed decree, an entry-level list would be produced from the 1982 examination by rounding the scores so as to create bands of candidates with equivalent scores. The number of appointments from that list would be limited to 72 persons. The *Davis* plaintiffs and Local 798 sought and were granted leave to intervene in the *United States* action in order to present their comments and criticisms regarding the proposed consent decree. The *Davis* plaintiffs filed a complaint in intervention which expanded their previous claims of discriminatory examinations to include a claim that a pattern and practice of racial discrimination and harassment existed at the Fire Department. The proposed consent decree was withdrawn by the United States and the City Attorney's office after several members of the San Francisco Board of Supervisors indicated they would not approve it because it did not impose hiring and promotional preferences for minority applicants and employees.

The District Court bifurcated the *United States* action so as to separate the examination issues from the pattern and practice claim added by the intervening *Davis* plaintiffs. A trial of the challenges to the 1982 entry-level examination and the 1984 Lieutenant examination was set for November of 1986. On October 23, 1986, the City conceded that it could not defend the validity of these challenged examinations and that it would not use these examinations to make permanent civil service appointments or for any other purpose.

The United States and the *Davis* plaintiffs thereupon moved for summary judgment that the City had violated Title VII by not conceding the invalidity of these examinations until the eve of trial. The United States sought to enjoin the City from any further use of discriminatory examinations and to require the City to provide equal opportunity for employment and promotion, but did not request that the City be required to hire or promote any specific number or ratio of females or minorities. The *Davis* plaintiffs requested the Court to hold its decision in abeyance as to the nature of the relief to be granted on the examination issues until the conclusion of the trial of their claim of a pattern and practice of discrimination which, they contended, would provide justification for the imposition of affirmative relief in the form of an order requiring the hiring and promotion of specific numbers or ratios of females and minorities.

On February 26, 1987, the District Court granted these separate motions for summary judgment and issued a permanent injunction granting the relief requested by the United States. *United States v. City and County of San Francisco*, 656 F.Supp. 276 (N.D.Cal. 1987) (Appendices pp. 104a-139a). This injunction, which was to remain in effect for five years, prohibited the City from making any use of these invalid examinations, prohibited the City from committing any further violations of Title

VII, required the City to institute recruitment and training programs for females and minorities, required the City to develop new entry-level and promotional examinations in accordance with the Uniform Guidelines on Employee Selection, set forth a schedule for the development and administration of these new examinations, and required the City to submit semiannual progress reports to the District Court. The injunction also provided that the City was to hire a limited number of female fire fighters on a "provisional" or temporary basis. (656 F.Supp. at pp. 288-293, Appendices pp. 128a-139a).

In its order granting the injunction, the District Court stated that the evidence before it at that time would not justify "affirmative relief," i.e., the permanent appointment of any specific numbers or ratios of women and minorities to entry-level or promotional positions. (656 F.Supp. at pp. 288-289, Appendices pp. 128a-129a). The District Court set a trial date for November of 1987 on the *Davis* plaintiffs' claim that a pattern and practice of racial discrimination and harassment existed at the San Francisco Fire Department.

On November 12, 1987, within days prior to the date the remainder of the *Davis* case was to be tried, the City and the *Davis* plaintiffs entered into a proposed consent decree, which they submitted to the District Court for approval. The proposed decree specifically required the hiring and promotion of certain numbers and ratios of females and minorities.

With regard to hiring, the proposed decree required the City to administer a special examination to the women who had been granted provisional appointments under the injunction of February 26, 1987, and to grant permanent appointments to the women who passed that special examination. *United States v. City and County of San Francisco*, 696 F.Supp. 1287, 1313 (N.D.Cal. 1988) (Appendices pp. 104a-139a).

The proposed decree imposed the additional requirement that the City hire at least 500 entry level firefighters during the life of the decree, and established what it called "goals" that for each entrance examination administered during that period, ten percent (10%) of the persons hired were to be women and fifty-five percent (55%) were to be minorities. (696 F.Supp. at pp. 1313-1314, Appendices pp. 82a-85a). It also established the long term "goal" of raising the minority representation of Fire Department employees to forty percent (40%) and the female representation to ten percent (10%), in order that the minority and female composition of the Fire Department "more nearly reflects the racial, ethnic, and sexual composition of the relevant labor force of the City and County of San Francisco." (696 F.Supp. at p. 1313, Appendices pp. 82a-83a). Finally, it required the City to restrict its hiring to persons who were "*bona fide* residents of the City at the time of and for a period of four months prior to the time of their application and through the date of appointment." (696 F.Supp. at pp. 1312-1313, Appendices p. 81a).

With regard to promotions, the proposed consent decree imposed a requirement that the City grant immediate promotions to the rank of Lieutenant to six named Black employees from the applicant pool for the 1978 promotional examination for that rank, and that it administer a special make-up examination for the rank of Captain to these same employees. The decree also required the City to grant immediate promotions to Lieutenant to 11 Black firefighters, 8 Hispanic firefighters, and 8 Asian or Filipino firefighters, using a list of eligibles prepared from the 1984 Lieutenant examination which the City had conceded to be invalid. The City, in its discretion, could promote an additional 48 firefighters from that abandoned examination, of whom 5 were to be Black, 5 to be Hispanic, and 2 to be Asian or Filipino. (696 F.Supp. at pp. 1314-1316, Appendices pp. 85a-89a).

In addition, the proposed decree established as a "goal" for all future promotional examinations that the percentage of minorities and women who would obtain promotions as the result of each such examination be the same as the percentage of minorities and women who would take that examination, and imposed a freeze on examinations for the rank of Battalion Chief until there were at least 10 Blacks in the rank of Captain or higher ranks. (696 F.Supp. at p. 1315, Appendices pp. 86a-87a).

The proposed decree provided that in the event the City failed to meet any of these hiring and promotional "goals," it would be required to justify that failure to the District Court, which could then order lawful actions and remedies to accomplish the achievement of the unfulfilled goals. (696 F.Supp. at p. 1314, Appendices pp. 83a-84a).

The United States, petitioner Local 798, and numerous individual firefighters filed objections to the proposed decree. (Appendices pp. 146a-165a [Objections of United States], Appendices pp. 166a-226a [Objections of Local 798]).

The United States objected that the consent decree provided for race-specific steps which were not narrowly tailored to remedy either alleged or proven unlawful activities of the City, and which thereby unconstitutionally and unlawfully infringed upon the rights of innocent third parties. (Appendices p. 150a). The United States also objected to the use of the invalid 1984 Lieutenant examination as a selection device for any permanent appointments to that rank. (Appendices p. 160a). In addition, the United States objected to the decree's provision for the promotion of 27 minority candidates who took that examination, since the manifest purpose of these promotions was not to redress past discrimination but instead was to remedy an imbalance between the proportion of minority supervisors and the proportion of minority employees in the Fire Department as a whole. (Appendices pp. 158a-159a).

The United States noted in its objection that to the extent such a workforce imbalance existed, it was to a substantial degree the inevitable result of the fact that the great majority of the Black, Hispanic and Asian members of the Fire Department had been hired since 1974 pursuant to court orders and a consent decree in a prior lawsuit. (Appendices pp. 159a). The United States noted further that the promotion of 27 minority candidates would actually result in a higher proportion of minorities than whites in promotive positions, in that there would be 7 more minorities in promotive positions than one would expect, given their proportion within the Fire Department workforce. (Appendices p. 159a, fn. 10).

Local 798 objected that the Statement of Undisputed Facts presented in support of the consent decree added no new substantive facts to those which the District Court had previously found insufficient to justify race-conscious relief. (Appendices pp. 172a-173a). Local 798 also objected to the use of the population of the City and County of San Francisco rather than the predominately nonminority population of the Standard Metropolitan Statistical Area as the basis for the determination of whether the City employed minorities at a rate less than the proportion of minorities in the "relevant labor force." (Appendices pp. 179a, 185a-186a, 191a-195a).

With regard to the consent decree's provision for the promotion of 27 minority employees to the rank of Lieutenant from a list of eligibles derived from the discarded 1984 examination, Local 798 objected that no minimum qualifying or passing score had been established for that examination and that some of the minority employees on that list were not even in the top half of the 415 persons tested and therefore probably did not achieve a passing score. (Appendices p. 200a-201a). Finally, Local 798 objected that the consent decree provided for the continued application of promotional "goals" for minorities even after a racial balance had been achieved in the rank

of Lieutenant, and thus did not merely seek to remedy a racial imbalance but instead impermissibly mandated the maintenance of racial balance. (Appendices p. 203a).

The District Court held a fairness hearing on the proposed consent decree on December 22, 1987, and, on June 10, 1988, entered an order approving the decree. *United States of America v. City and County of San Francisco, supra*, 696 F.Supp. 1287 (Appendices pp. 28a-103a). The United States and Local 798 filed timely notices of appeal.

On December 4, 1989, the Ninth Circuit issued a decision affirming the District Court order approving the consent decree. *Davis v. City and County of San Francisco*, 890 F.2d 1438 (9th Cir. 1989) ("*Davis v. CCSF*") (Appendices pp. 1a-27a).

After stating that the standard of its review of a consent decree is "abuse of discretion" and that, accordingly, it would reverse approval of a consent decree "only upon a strong showing that the district court's decision was a clear abuse of discretion," the Ninth Circuit concluded that it found nothing in the record to indicate any such abuse. *Davis v. CCSF*, *supra*, 890 F.2d at pp. 1444-1445, 1452, Appendices pp. 10a, 27a.

On May 9, 1990, the Ninth Circuit denied Local 798's petition for rehearing and rejected its suggestion for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

I. Application Of The Abuse Of Discretion Standard Of Appellate Review To Consent Decrees Which Adversely Affect Nonminority Employees Is Contrary To The Principle Established By This Court That Strict Scrutiny Is To Be Applied To Municipal Employment Programs Which Embrace Preferences Based On Race.

This Court has held in several instances that the federal appellate courts are to review with "strict scrutiny" municipal employment programs which embrace hiring and promotional preferences based on race. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *United States v. Paradise*, 480 U.S. 149 (1987); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

The Ninth Circuit acted in conformity with this rule in *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987) ("*Ass'd Gen'l Contractors*"), in which it independently reviewed the findings of the City's Board of Supervisors in an appeal from a District Court judgment upholding a municipal ordinance which, on the basis of those findings, provided for preferences in city contracting with businesses owned by minorities, women, or local residents. *Id.*, at p. 931.

In contrast to the independent appellate review and the "exacting judicial examination" applied in *Ass'd Gen'l Contractors*, the Ninth Circuit and the other Courts of Appeals have applied the very liberal "abuse of discretion" standard of appellate review where, as here, a District Court has upheld municipal employment programs which embrace hiring and promotional preferences based on race but which are embodied in a consent decree rather than in an ordinance. *Davis v. City and County of San Francisco, supra*, 890 F.2d 1438, Appendices pp. 1a-27a; *Kirkland v. N.Y. State Dept. of Correctional Services*, 520 F.2d 420, 429-430 (2d Cir. 1975); *Ass'n.*

Against Discrimination v. City of Bridgeport, 647 F.2d 256, 278-279 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); *Berkman v. City of New York*, 705 F.2d 584, 597 (2d Cir. 1983); *Moore v. Nat'l. Assn. of Securities Dealers, Inc.*, 762 F.2d 1093, 1106 (D.C. Cir. 1985); *Williams v. City of New Orleans*, 729 F.2d 1554, 1558-1559 (5th Cir. 1984) (discussing case of *United States v. City of Alexandria*, 614 F.2d 1358 (1980) as an "exceptional circumstance" to the Fifth Circuit's "expressed preference" for the abuse of discretion standard of review); *Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 555 (6th Cir. 1982), *cert. granted, Firefighters Local No. 1784 v. Stotts*, 462 U.S. 1105, rev'd 467 U.S. 1105; *Vanguards of Cleveland v. City of Cleveland and Local 93, I.A.F.F., AFL-CIO*, 753 F.2d 479, 484 (6th Cir. 1985), *cert. granted, Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 474 U.S. 816, aff'd 478 U.S. 501 (1986); *Armstrong v. Bd. of School Directors, Etc.*, 616 F.2d 305, 313-314 (7th Cir. 1980); *South v. Rowe*, 759 F.2d 610, 613 (7th Cir. 1985).

Presumably because it assumed that it could reverse the District Court's 1988 order approving the consent decree in this case "only upon a strong showing that the district court's decision was a clear abuse of discretion" (890 F.2d at p. 1445, Appendices p. 10a), the Ninth Circuit upheld the District Court's order even though the decree required the promotion of 39 minority firefighters who had not passed a valid civil service examination or otherwise demonstrated prior to their promotions that they were qualified for those appointments, and even though those promotions were not made for the purpose of remedying past discrimination but instead were made solely for the purpose of achieving and maintaining racial balance in the fire department's upper ranks.

Had the Ninth Circuit independently applied "strict scrutiny" rather than merely review the District Court's order for an abuse of discretion, it clearly would not

have approved a consent decree granting race and gender conscious relief based upon the same foundational facts that the District Court had previously found insufficient to justify such relief in its February 26, 1987, injunctive order granting plaintiffs' motions for summary judgment.

As the Court explained in *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, —— U.S. ——, 110 S.Ct. 2997 (June 27, 1990), a more rigorous standard of judicial review applies to race and gender conscious employment programs adopted by state and local governments than to racial classifications employed by Congress. Whereas deference is to be given to racial classifications employed by Congress because it is a co-equal branch of government, "strict scrutiny" is to be applied to race and gender conscious employment programs adopted by state and local governments because there is "a heightened danger of oppression from political factions in small, rather than large, political units" and a more significant likelihood that municipal governments will be used as instruments of discrimination. *Id.*, at p. ——, quoting *City of Richmond v. J. A. Croson Co.*, *supra*, 488 U.S. 469, 522-523 (Scalia, J., concurring).

This case demonstrates that the same political influences and dangers of oppression can be present when a municipal government enters into a consent decree as when it adopts an "affirmative action" ordinance for minority owned businesses in city contracting.

Such political influences are the only reasonable explanation for the rejection by the San Francisco Board of Supervisors in 1984 of a consent decree proposed by the City Attorney's office and the United States Department of Justice, but opposed by the *Davis* plaintiffs because that decree did not grant jobs and promotions to minorities and females except through the competitive civil service examination process, and subsequent approval by the Board of Supervisors in 1988 of a consent decree with the *Davis* plaintiffs which was opposed by

the United States because that decree required the promotion on the basis of an admittedly invalid examination of minority candidates in numbers substantially in excess of those necessary for minorities to achieve parity with nonminorities in the promotional ranks of the San Francisco Fire Department.

Such political influences are also demonstrated by the fact that the consent decree that was subsequently approved by the Board of Supervisors and the District Court in 1988 imposes a residency requirement upon applicants for City employment that is entirely impermissible under the California Constitution (*See Cooperrider v. Civil Service Comm'n*, 97 Cal.App.3d 495 (1979)), and inconsistent with the holding of this Court in *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977), that a local government may not artificially establish a labor market which includes or excludes geographical areas on the basis of the number of minority persons who reside in those areas.

Accordingly, no less exacting standard of appellate review should be applied by the Courts of Appeals merely because a municipal employment program comes before the court in the form of a consent decree rather than an ordinance.

The "abuse of discretion" standard of appellate review may be appropriate when a member of the class represented by the plaintiffs appeals a consent decree on the ground that the class relief is inadequate (*See, e.g., Officers For Justice v. Civil Service Comm'n*, 688 F.2d 615 (9th Cir. 1982); *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977); *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3d Cir. 1974); and *City of Detroit v. Ginnell Corp.*, 495 F.2d 448 (2d Cir. 1974)), since such an appeal does not present the factors which give rise to a "strict scrutiny" analysis. However, where, as here, an appeal is taken from a consent decree by adversely affected nonminority employees, and the elements requir-

ing "strict scrutiny" are present, application of the "abuse of discretion" standard of appellate review erroneously permits municipal governments to grant employment preferences to minorities and women simply to dispel the lingering effects of societal discrimination rather than to remedy discrimination which those governments have perpetuated themselves. The inevitable result is the infringement of the equal protection rights of substantial numbers of nonmonority employees.

A compelling need clearly exists for consistency in the standard of review that is applied by the federal appellate courts in cases involving challenges to municipal employment programs which provide preferential treatment for females and minorities. The standard of review should not be different merely because one such program comes before the court as an ordinance and the other as a consent decree.

This important question of federal law has not been, but should be, settled by this Court in order to eliminate this irrational inconsistently in the decisions of the Courts of Appeals and to ensure that the equal protection rights of all municipal employees, minority and nonminority, are accorded the same dignity in the federal courts.

This Court should therefore grant this petition for a writ of certiorari and direct the Ninth Circuit that "strict scrutiny" is to be applied in all cases involving challenges by adversely affected nonminority employees to municipal employment programs which provide preferential treatment for females and minorities, regardless of whether those programs are incorporated in consent decrees or ordinances.

II. The Ninth Circuit's Use Of The City And County Of San Francisco As The Relevant Labor Market To Determine Whether Plaintiffs Established A *Prima Facie* Case Of Employment Discrimination In The San Francisco Fire Department Is Contrary To The Holding Of This Court And The Holdings Of The Other Courts Of Appeals That The Relevant Labor Market Is The Standard Metropolitan Statistical Area.

This petition should also be granted for the reason that the standard which the Ninth Circuit applied in this case for the establishment of a *prima facie* case of unlawful employment discrimination on the basis of a statistical imbalance between the employer's work force and the relevant labor market is in direct conflict with the standard applied by this Court and the other Courts of Appeals in cases involving similar circumstances.

It was necessary for the District Court to find facts demonstrating such a *prima facie* case of unlawful employment discrimination before it could approve a consent decree which provides affirmative, race-conscious relief. *Johnson v. Transportation Agency*, 480 U.S. 616, 649-653 (1987) (O'Connor, J., concurring); *Wygant v. Jackson Board of Education, supra*, 467 U.S. 267, 274 (There must be "some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.")

This Court recently held in a case involving private sector employment that in order to establish a *prima facie* case of unlawful employment discrimination through the use of statistics showing that minorities are underrepresented in the employer's work force, the comparison that is the basis for those statistics may not be to an artificially defined population pool but rather must be to the "qualified" population in the relevant labor market. *See Wards Cove Packing Co. v. Atonio*, —— U.S. ——, 109 S.Ct. 2115 (1989) ("*Wards Cove*"):

> It is clear to us that the Court of Appeals' acceptance of the comparison between the racial composition of the cannery work force and that of the noncannery work force, as probative of a prima facie case of disparate impact in the selection of the latter group of workers, was flawed for several reasons. Most obviously, with respect to the skilled noncannery jobs at issue here, the cannery work force in no way reflected "the pool of *qualified* job applicants" or the "*qualified* population in the labor force." (emphasis in original).
>
> *Id.*, at 109 S.Ct., p. 2121-2122.

See also Hazelwood School Dist. v. United States, supra, 433 U.S. 299 (District Court must make findings that the labor market being used as the basis for statistical comparisons does not improperly include or exclude geographical areas with substantial numbers of qualified minorities); and *Associated General Contractors of California, Inc. v. City and County of San Francisco, supra*, 813 F.2d 922, 934 (affirmative action plan not justified by finding of San Francisco Board of Supervisors of past unlawful discrimination against minority enterprises in awards of municipal contracts because that finding was based solely on awards of contracts to firms within the City and County of San Francisco rather than awards of contracts to the actual pool of available contractors, which included many firms outside the city's borders).

For positions such as police officer and firefighter, involving skills that members of the general population may possess, other Courts of Appeals have held that the relevant labor market is not the population of the municipality itself but instead is the general population in the actual geographic area from which the employer can reasonably be expected to recruit new employees in which its current employees are likely to reside. *See, e.g., Williams v. City of New Orleans, supra*, 729 F.2d 1554 (District court properly disapproved consent decree in which quota hiring was based on a comparison of the number

of black police officers employed by City of New Orleans to the percentage of black persons in the population of Orleans Parish rather than to the percentage of black persons in the Standard Metropolitan Statistical Area); and *Hammon v. Barry*, 826 F.2d 73 (D.C. Cir. 1987) *den. rehear en banc, cert. denied Barry v. United States*, 486 U.S. 1036 (1988) (District of Columbia Fire Department affirmative action plan held invalid because no imbalance existed between the percentage of blacks currently employed as firefighters and the percentage of blacks in the entire District of Columbia metropolitan area). As the *Hammon v. Barry* court clearly articulated:

> [T]he percentage of blacks in the District's Fire Department is to be compared with the percentage of blacks in the area labor force. There should be no mistaking the correct benchmark in this case: the relevant labor force consists of persons 20 to 28 years of age in the *Washington metropolitan area*, not just within the confines of the Nation's capital.
>
> *Id.*, at 77.

Art. XI, § 10(b) of the California Constitution specifically forbids the City and County of San Francisco from restricting its labor force to City and County residents, and thus requires the City and County to hire and employ persons from the entire metropolitan Bay Area. *Cooperrider v. Civil Service Comm'n, supra*, 97 Cal. App.3d 495. It necessarily follows that for employment in the San Francisco Fire Department, the relevant labor market is the Standard Metropolitan Statistical Area, which comprises the entire metropolitan San Francisco Bay area. *See EEOC v. Chicago Miniature Lamp Works*, 622 F.Supp. 1281, 1288-89 (N.D. Ill. 1985):

> "Standard Metropolitan Statistical Area" ("SMSA") is a geographical area comprising a city having a population of 50,000 or more, the county in which the city is located and the outlying counties that have a high degree of economic and social integration with the nucleus.

However, instead of using the metropolitan San Francisco Bay area as the relevant labor market for the purpose of determining whether a *prima facie* case of unlawful employment discrimination had been demonstrated on the basis of a statistical imbalance between the employer's work force and the relevant labor market, the District Court concluded that a *prima facie* case of unlawful employment discrimination was established based upon a comparison of the representation of females and minorities in the work force of the San Francisco Fire Department to the representation of females and minorities among residents of the City and County. 696 F.Supp. at p. 1308-1309, Appendices pp. 71a-73a. The Ninth Circuit gave its unqualified approval to this holding. 890 F.2d at pp. 1446-1447, Appendices pp. 14a-15a.

The Ninth Circuit has thus adopted a standard in direct conflict with the standard adopted by the other Courts of Appeals for the establishment of a *prima facie* case of unlawful employment discrimination by a municipal employer on the basis of a statistical imbalance between the employer's work force and the relevant labor market.

This Court made clear in *Hazelwood*, *supra*, that a public sector employer cannot artificially establish a labor market that includes or excludes geographical areas on the basis of race, and recently affirmed in *Wards Cove*, *supra*, that the proper statistical comparison for the establishment of a *prima facie* case using a Title VII disparate impact analysis is between the racial composition of a private sector employer's work force and the racial composition of the qualified population in the labor market actually utilized by the employer. These principles compel the conclusion that the District Court and the Ninth Circuit erred in holding that a *prima facie* case of employment discrimination was established by a comparison of the composition of the work force of the San Francisco Fire Department to the population of the City and

County rather than to the general population in the actual geographic area from which the City would reasonably be expected to recruit new employees and in which its current employees are likely to reside.

Because the decision of the Ninth Circuit on this issue is squarely in conflict with the decisions of other Courts of Appeals on the same issue, and because the application of the principles of *Hazelwood* and *Wards Cove* to the establishment of a *prima facie* case of unlawful employment discrimination against a public sector employer is an important question of federal law that has not been, but should be, settled by this Court, this Court should therefore grant this petition for a writ of certiorari and reverse the decision of the Ninth Circuit that such a *prima facie* case may be established merely by a comparison between a municipal employer's work force and the city's population.

III. The Ninth Circuit Has Erroneously Approved A Consent Decree Under Which A Municipal Employer Is To Grant Promotions To Minority Employees Who Have Not Demonstrated That They Possess The Minimum Qualifications For Civil Service Appointments To Those Positions.

This petition should also be granted in order that this Court may review the Ninth Circuit's decision of the important federal question of whether a consent decree may require a municipal employer to grant promotions to minority employees who have not demonstrated through competitive examinations that they possess the minimum qualifications for civil service appointments to those positions.

Section 706(g) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5) prohibits the federal courts from "requir[ing] . . . the promotion of an individual as an employee who was refused . . . advancement . . . for any reason other than discrimination . . . ."

This section and the equal protection clause of the Fourteenth Amendment have caused the other Circuit Courts of Appeals to hold that affirmative action measures cannot be utilized to place a person into a position of employment for which that person has never demonstrated that he or she is qualified. *Bratton v. City of Detroit*, 704 F.2d 978 (6th Cir. 1983); *Williams v. City of New Orleans*, *supra*, 729 F.2d 1554; *Youngblood v. Dalzell*, 804 F.2d 360 (6th Cir. 1986); *League of Martin v. City of Milwaukee*, 588 F.Supp. 1004 (E.D. Wis. 1984); *Vanguards of Cleveland v. City of Cleveland and Local 93 I.A.F.F., AFL-CIO*, *supra*, 753 F.2d 479; *Hammon v. Barry*, *supra* (hiring goal unlawful because appointments were made on the basis of an invalid exam in the absence of nearly any other screening criteria); and *Williams v. Vukovich*, 720 F.2d 909 (6th Cir. 1983) (all firefighters have a legitimate expectation to be promoted on the basis of their qualifications).

Here, however, the Ninth Circuit has approved a consent decree which required the City to promote 27 firefighters to the rank of Lieutenant and permitted the City to promote an additional 48 firefighters to that rank based upon the scores achieved by these firefighters on an admittedy invalid examination. No minimum passing score was ever established for this test. On the basis of experience in the establishment of minimum passing scores on previous promotional examinations for the rank of Lieutenant, it is likely that some of the firefighters who received these promotions had scores below the minimum score necessary to be deemed qualified for promotion. As noted by the District Court, none of these firefighters could legitimately claim that they were entitled to receive such promotions as the remedy for unlawful employment discrimination perpetrated against them.

A manifestly compelling public interest requires that unqualified persons be excluded from positions with critical responsibilities for the protection of the public safety.

The Court of Appeals and the District Court have given short shrift to this important public interest as well as to the equal protection rights of all other members of the San Francisco Fire Department, who must still obtain their promotions by demonstrating through valid competitive examinations that they possess the minimum qualifications for civil service appointments to those positions.

The interpretation and application of Title VII and the equal protection clause in these circumstances is an important question of federal law that has not been, but should be, settled by this Court. Accordingly, this Court should grant this petition for a writ of certiorari and reverse the decision of the Court of Appeals approving those provisions of the consent decree which provide for promotions to the rank of Lieutenant in the San Francisco Fire Department from a list of eligibles compiled from the admittedly invalid promotional examination which the City administered for that rank in 1984.

IV. The Ninth Circuit's Approval Of A Consent Decree That Was Not Narrowly Tailored To Remedy Past Discrimination But Instead Was Manifestly Designed To Establish And Maintain A Balance Between The Number Of Females And Minorities In The Work Force Of The San Francisco Fire Department And The Number Of Females And Minorities Among Residents Of The City And County Is In Conflict With This Court's Treatment Of Such Decrees.

Finally, this petition for a writ of certiorari should be granted because the decision of the Ninth Circuit is in conflict with the decisions of this Court that affirmative race-conscious relief may be imposed by the courts only when it has been conclusively demonstrated that there is no other effective way to ensure the full enjoyment of rights protected by Title VII of the Civil Rights Act of 1964 (*Local 28 of Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421, 448-453 (1986)), and that such relief may

never be adopted solely for the purpose of correcting a racially imbalanced work force, but is only appropriate when other, race-neutral remedies have proven ineffective, and then must be narrowly tailored to the specific employment practices that have been found unlawful. *Id.* at 448-449; *United States v. Paradise*, 480 U.S. 149, 166-177 (1987).

Although females and minorities still remain underrepresented in the San Francisco Fire Department, the City's unlawful past discrimination had been effectively remedied by the District Court through a series of injunctive orders and a consent decree in *Western Addition Community Org. (WACO) v. Alioto*, 330 F. Supp. 536 (N.D. Cal. 1971), and 369 F. Supp. 77 (N.D. Cal. 1973), *appeal dismissed as moot*, 515 F.2d 542 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 1014 (1975). Further relief had been granted by the District Court's order of February 26, 1987, as the remedy for unlawful discrimination committed by the City after the expiration of the *WACO* consent decree in 1982.

As part of that further relief, the District Court's order of February 26, 1987, required the City to develop new entry-level and promotional selection procedures that were valid and nondiscriminatory and permanently enjoined the City from committing any further violations of Title VII of the Civil Rights Act of 1964. This same order required the City to hire its first female firefighters. The District Court also directed the City to maintain an extensive program of recruitment and training directed at increasing the number of qualified Black, Hispanic, Asian and female applicants for firefighter positions.

The District Court specifically recognized in its order of February 26, 1987, that the City's abandonment of the 1982-83 entry-level examination and the 1984 promotional examinations eliminated any claim by the females and minorities who took those examinations that they had been denied individual employment opportunities in

violation of Title VII. The District Court also stated that the record before it at that time did not justify "affirmative relief" or any other remedy beyond the permanent injunctive relief and interim hiring provisions set forth in its order.

In other words, it could not be conclusively demonstrated at that time that there was no effective way other than affirmative, race-conscious relief to ensure the full enjoyment of rights protected by Title VII.

With the single exception of the decision by the California Court of Appeal that a job-related promotional examination administered by the City in 1978 had nevertheless unlawfully discriminated against Black candidates because that examination had failed to test for supervisory skills and abilities (*City and County of San Francisco v. Fair Employment & Housing Comm'n, supra*, 191 Cal.App.3d 976), no new evidence of unlawful discrimination was presented to the District Court between the entry of the order of February 26, 1987, and the submission of the consent decree to the District Court for approval on November 12, 1987. No entry-level or promotional examinations were given by the City during this period, hence there was no evidence that the City had resisted or purposely failed to comply with the requirements of the February 26, 1987, order.

Accordingly, since the District Court had specifically recognized in its order of February 26, 1987, that there was no evidence in the record at that time to support the imposition of "affirmative relief," the only evidence in the record at the "fairness hearing" on December 22, 1987 to support affirmative, race-conscious relief was the occurrence of discrimination against Black candidates in the 1978 examination for Lieutenant. However, instead of providing relief narrowly tailored to the City's unlawful discrimination against the Black candidates who took the 1978 Lieutenant examination, the District Court approved a consent decree which not only required the pro-

motion of 6 Black persons who had taken that examination but also required the City to immediately promote 11 Black, 8 Hispanic, and 8 Asian or Filipino firefighters who had taken the abandoned 1984 promotional examination for the rank of Lieutenant and permitted the City to promote 5 additional Black firefighters, 5 additional Hispanic firefighters, and 2 additional Asian or Filipino firefighters from among the participants in that 1984 examination.

This grant of affirmative, race-conscious relief to minority employees who took the 1984 promotional examination for the rank of Lieutenant was clearly contrary to the holdings of *Local 28 of Sheetmetal Workers v. E.E.O.C.*, *supra*, 478 U.S. 421, that such relief may be granted only when there is no other effective way to ensure the full enjoyment of Title VII rights, and *United States v. Paradise*, *supra*, 480 U.S. 149, that such relief may never be adopted solely for the purpose of correcting a racially imbalanced work force or in the absence of a showing that other, race-neutral remedies have proven ineffective, and must be narrowly tailored to the specific employment practices that have been found unlawful.

It was also in conflict with the holding of *Paradise* in another significant respect. The promotional "quotas" permitted to exist in *Paradise*, which were imposed for the upper ranks of the work force, were to remain in effect only while there were qualified Black candidates, while the rank at issue was less than 25% Black, and while the employer had not developed and implemented a promotion plan without adverse impact for that rank. *Id.*, 480 U.S. at 163. Here, on the other hand, promotions to the upper ranks in the work force are made subject by the decree to limitations and restrictions, such as the senseless prohibition against apointments of White, Hispanic and Asian employees to the rank of Battalion Chief pending the appointment of 10 Black employees to the rank of Captain or higher ranks, which are to re-

main in effect regardless of whether the City administers nondiscriminatory promotional examinations.

The decision of the Ninth Circuit affirming the consent decree is thus clearly in conflict with the decisions of this Court.

CONCLUSION

For all of the reasons set forth above, the writ of certiorari should be granted and the judgment reversed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 88-1905, 88-2735, 88-2884, 88-15473 and 88-15474

FONTAINE DAVIS, ERIC H. WASHINGTON; JERILYN NORTH; ROBERT L. DEMMONS; JIMMIE BRADEN; AUDRY LEE; EARLY DAVIS; BRANDI SWANSON; SUSAN MOOREHEAD; ANNE YOUNG; MARY M. CARDER; THERESA RODIGOU; KATHLEEN J. BRADSHAW; PATRICIA MURRAY; INTERNATIONAL ASSOCIATION OF BLACK FIREFIGHTERS-SAN FRANCISCO CHAPTER; UNITED STATES OF AMERICA,
Plaintiffs-Appellees,

v.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, *et al.*;
Defendants-Appellees,

JOHN W. FLAHERTY; EDWARD E. MURPHY; WILLIAM M. SHAUGHNESSY; ALFRED E. SMYTH,
Respondents-Appellants,

SAN FRANCISCO FIREFIGHTERS, LOCAL 798,
Defendant-Intervenor-Appellant.

UNITED STATES OF AMERICA,
Plaintiff,

and

FONTAINE DAVIS, *et al.*,
Plaintiffs in Intervention/Appellees,

v.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendant-Appellee,

v.

SAN FRANCISCO FIRE FIGHTERS LOCAL 798,
Defendant in Intervention/Appellant (Four Cases).

FONTAINE DAVIS, *et al.*,
Plaintiffs-Appellees,

v.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendants-Appellees,

v.

SAN FRANCISCO FIREFIGHTERS LOCAL 798,
Defendant in Intervention/Appellant (Three Cases).

FONTAINE DAVIS,
Plaintiff-Appellee,

v.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendants-Appellees,

v.

SAN FRANCISCO FIREFIGHTERS LOCAL 798,
Defendant in Intervention/Appellant.

Appeal from the United States District Court
for the Northern District of California

Argued and Submitted June 5, 1989

Decided Dec. 4, 1989

Duane W. Reno, Davis Reno & Courtney, San Francisco, Cal., for defendant in intervention-appellant.

William C. McNeill, III, Employment Law Center, San Francisco, Cal., for plaintiffs in intervention-appellees.

Louise H. Renne, City Atty., Dan Siegel, Chief of Complex Litigation, San Francisco, Cal., for defendant-appellee.

Before FARRIS, THOMPSON and TROTT, Circuit Judges.

DAVID R. THOMPSON, Circuit Judge:

Appellant San Francisco Firefighters Local 798 ("the Union") challenges a consent decree executed by the City and County of San Francisco ("the City") and various individuals and organizations who intervened as plaintiffs in the underlying suit (hereinafter collectively referred to as "Davis").[1] The consent decree settled Title VII class action litigation in which it was contended that the San Francisco Fire Department (the "SFFD") and the City discriminated in hiring and promoting firefighters based on gender, race and national origin.

The Union contends the decree is not fundamentally fair as required by Fed.R.Civ.P. 23(e) and its affirmative relief violates the equal protection provisions of the fourteenth amendment and Title VII. The Union also challenges the district court's denial of its motion to enjoin the City from using a new method to assign seniority to firefighters promoted pursuant to the terms of the decree. We affirm the district court's approval of the consent decree.

Prior to approving the decree, the district court granted the plaintiffs' motion for partial summary judgment and enjoined the defendants from engaging in any unlawful discrimination. This injunction ("the 1987 injunction") was included as section A of the district court's order in its judgment filed February 26, 1987. *United States v. City and County of San Francisco*, 656 F.Supp. 276, 289-

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[1] Plaintiff-intervenors are Fontaine Davis, Eric H. Washington, Jerilyn North, Robert L. Demmons, Jimmie Braden, Audry Lee, Early Davis, Brandi Swanson, Susan Moorehead, Anne Young, Mary M. Carder, Theresa Rodigou, Kathleen J. Bradshaw, Patricia Murray, Chinese for Affirmative Action ("CAA") and the Mexican American Legal Defense Fund ("MALDEF").

90 (N.D.Cal.1987) ("*Davis I*").[2] Thereafter, the Davis plaintiffs filed a motion in the district court seeking to hold the City in contempt for violating the 1987 injunction. On January 14, 1988, the district court held a contempt hearing. As a result of this hearing, rather than finding the City in contempt, the district court issued an unpublished injunction which it filed February 5, 1988 ("1988 injunction"). This injunction required specified officers of the SFFD to carry out and ensure compliance with a variety of measures designed to end racial and sexual discrimination and harassment at the SFFD. The union and the SFFD officers named in the 1988 injunction (collectively "Union") appeal. We affirm the district court's grant of the 1988 injunction.

We first analyze the Union's appeal of the district court's approval of the consent decree. We then consider the Union's appeal of the 1988 injunction. Finally, we consider the appellees' request for attorney fees.

PART ONE: THE CONSENT DECREE

I

BACKGROUND

The consent decree settles extensive state and federal litigation concerning claims of discrimination dating back to 1970. The district court opinion approving the decree describes in detail the legal and factual history of this

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[2] The 1987 injunction provided in pertinent part:

> Defendants are permanently enjoined from engaging in any act or practice that has the purpose or effect of unlawfully discriminating against any employee of, or any applicant for employment with, the San Francisco Fire Department because of such individual's race, sex, or national origin, and specifically from unlawfully discriminating at any time on the basis of race, sex, or national origin in hiring, promotion, upgrading, training, assignment, discharge, compensation, and terms and conditions or privileges of employment. . . .

Davis I, 656 F.Supp. at 289-90.

litigation. *United States v. City and County of San Francisco*, 696 F.Supp. 1287, 1289-98 (N.D.Cal.1988) ("*Davis III*"). We set out a brief summary below.

A. *Prior Entry-Level Litigation*

Until 1955, the SFFD had hired no Black firefighters. Women had been barred from applying until 1976, and the first woman firefighter was not hired until August 1987. The NAACP and several community groups filed a federal suit in 1970 challenging entry-level hiring practices on the sole ground of racial discrimination under 42 U.S.C. §§ 1981 and 1983. *Western Addition Community Org. [WACO] v. Alioto*, 330 F.Supp. 536 (N.D. Cal.1971) ("*WACO I*"). The district court found the entry-level exam had a disparate impact on minorities and the City had failed to show the exam's components were job-related. *Id.* at 539-40.

The City unsuccessfully revised its entry-level firefighter exam. The district court invalidated the new test. It ruled that no job analysis had been conducted and therefore the court could not determine whether the exam was reasonably related to job requirements. *Western Addition Community Org. [WACO] v. Alioto*, 340 F.Supp. 1351, 1356 (N.D.Cal.1972) ("*WACO II*"). A second revision was rejected when the City failed to empirically validate the new test. *Western Addition Community Org. [WACO] v. Alioto*, 360 F.Supp. 733, 739 (N.D.Cal.1973) ("*WACO III*").

The district court granted affirmative relief in 1973 after the City failed to either validate the entry-level test or formulate a new one. *Western Addition Community Org. [WACO] v. Alioto*, 369 F.Supp. 77 (N.D.Cal.1973) ("*WACO IV*"), *appeal dismissed as moot*, 514 F.2d 542 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 1014, 96 S.Ct. 446, 46 L.Ed.2d 385 (1975). The court ordered one-for-one White to minority hiring from the 1973 entry-

level list, regardless of rank, until the list of qualified applicants—those who had answered at least fifty of the 100 written questions correctly and had passed the oral and athletic exams—was exhausted. *Id.* at 80-81.

The *WACO* litigation was settled in 1977 by a five-year consent decree which established guidelines for using exam components, included no affirmative relief and set a goal of 40% minority representation on the entry-level list. *Western Addition Community Org.* [*WACO*] *v. Alioto*, No. C-70-1335 WTS, slip op. at 9-10 (N.D.Cal. May 18, 1977) ("*WACO V*").

B. *Prior Promotional Litigation*

In 1980 Black firefighters filed complaints with the California Department of Fair Employment Housing ("DFEH"). They alleged that the 1978 exam for promotions to lieutenant was discriminatory. Following an administrative hearing, the DFEH's successor, the California Fair Employment and Housing Commission ("FEHC"), determined the 1978 exam had an adverse impact on Blacks and the City had failed to show the exam was job-related. *See City and County of San Francisco v. Fair Employment and Housing Comm'n* [*FEHC*], 191 Cal.App.3d 976, 981, 236 Cal.Rptr. 716 (1987) (upholding FEHC decision because supported by substantial evidence) ("*FEHC*").

The state court of appeals concluded that the FEHC had established a *prima facie* case of discrimination based on a significant disparity between the passing rates of White and Black applicants. Under the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. 1607.4 (D) (1988), a selection rate among minority applicants of less than 80% of the group with the highest selection rate (usually Whites) is strong evidence of adverse discrimination. On the 1978 lieutenant promotion exam, the ratio of the pass rate of Blacks to that of Whites was 38%; the pass rate ratio was 65% for Hispanics

and 13% for Asian/other firefighters. *Davis III*, 696 F.Supp. at 1294.

The court further found that the primary component of a lieutenant's job was supervision. Consequently, the City had failed to show the exam was job-related because it did not test supervisory skills and the City had shown no correlation between exam results and performance as a lieutenant. *FEHC*, 191 Cal.App.3d at 990, 236 Cal. Rptr. 716.

C. *Current Litigation Underlying the Consent Decree*

The City administered a new entry-level test in 1982-83 and new promotion tests for lieutenant and fire inspector in 1984. Following publication of the results of the entry-level test, the United States and the plaintiff-intervenors brought separate suits against the City under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1982), and the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. § 6701 et seq. (1982) (repealed 1986).[3] The actions sought relief for the City's failure to correct the effects of past discrimination and for the continued use of invalid hiring exams and practices which adversely impacted women and minorities.

The district court found the written component of the 1982-83 entry-level exam produced a passing rate of 59% for Blacks, 74% for Hispanics and 69% for Asians in relation to the passing rate for White applicants. *Davis III*, 696 F.Supp. at 1296. The passing rate on the second component of the exam, the Physical Agility Test ("PAT"), was 91% for Blacks, 84% for Hispanics, 73% for Asians and 36% for women, compared with White applicants. Because applicants had to pass the written

[3] The United States sued on behalf of Black, Asian and Hispanic applicants; the plaintiff-intervenors sought relief for women and Blacks and included claims of racial harassment. Asian and Chinese intervenors subsequently joined the suit. The actions were consolidated in 1986.

exam before they could take the PAT, 66% of the top 190 scorers on the entire exam who were certified to the eligibility list were White. Nineteen percent were Black, 5% were Hispanic, 8% were Asian and none were women. *Id.*

The district court enjoined the City's use of the entry-level test results for hiring purposes and granted partial summary judgment on the claims that the exam adversely impacted Blacks and the PAT adversely affected women. *Id.* In October 1986, on the eve of trial of the remaining issues, the City withdrew the entry-level tests and announced it would not defend the promotional tests. *Id.* In February 1987 the district court found that the facts established a *prima facie* violation of Title VII and granted the plaintiffs' motion for partial summary judgment. *Davis I*, 656 F.Supp. 276, 282 and 288. The court also provided for interim hiring and permanently enjoined the City and SFFD from further violating Title VII. *Id.* at 289-92. Large portions of the injunction subsequently were incorporated into the consent decree.

D. *The Consent Decree*

The consent decree was filed with the court on November 12, 1987. A fairness hearing was held on December 22, 1987, and the decree was approved by court order on June 10, 1988. Both the United States and the Union opposed the decree. The United States did not participate in negotiations leading up to the settlement. The Union participated, objected to the terms and did not sign the decree. Consequently the Union is not a party to it.

The terms of the decree are set out in full in Appendix A to the district court's opinion in *Davis III*, 696 F.Supp. at 1311.

II

JURISDICTION

The Union appeals two district court orders approving the consent decree. We have jurisdiction to hear these appeals pursuant to 28 U.S.C. §§ 2106 and 1292(a)(1). The Union also appeals two orders denying its request for an injunction barring the City's assignment of seniority to firefighters promoted pursuant to the decree. We have jurisdiction to decide these appeals under 28 U.S.C. § 1292(a)(1).

III

ANALYSIS

A. *Fairness*

1. Standard of Review

Under Fed.R.Civ.P. 23(e), a class action settlement agreement requires district court approval.[4] The district court reviews the decree under a "universally applied standard" to determine whether the settlement is "fundamentally fair, adequate and reasonable." *Officers for Justice v. Civil Service Comm'n of the City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir.1982), *cert. denied*, 459 U.S. 1217, 103 S.Ct. 1219, 75 L.Ed.2d 456 (1983).[5]

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[4] Rule 23(e) provides in pertinent part:

> A class action shall not be dismissed or compromised without the approval of the court. . . .

Fed.R.Civ.P. 23(e). *See also Officers for Justice v. Civil Service Comm'n of the City and County of San Francisco*, 688 F.2d 615, 623 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217, 103 S.Ct. 1219, 75 L.Ed.2d 456 (1983).

[5] This circuit has stated that the primary purpose of the court approval requirement of Fed.R.Civ.P. 23(e) is to protect the interests of *class members* who may not have received due consideration by those negotiating the settlement. *Id.* at 624. It is therefore unclear whether the Union has standing to challenge the decree

A district court's approval of a consent decree is reviewed for abuse of discretion. *Officers for Justice*, 688 F.2d at 625-26. An appellate court will reverse approval of a consent decree "only upon a strong showing that the district court's decision was a clear abuse of discretion." *Id.* at 626. Factual findings supporting the order approving the decree are accorded "great weight," and the appellate court will not substitute its notions of fairness for those of the district judge and the parties to the agreement. *Id.*

2. Analysis

In deciding whether a consent decree is fair, adequate and reasonable, the district court must balance several factors, including but not limited to: strength of the plaintiffs' case; risk, expense, complexity and possible duration of continued litigation; relief offered in settlement; extent of discovery already completed; stage of proceedings; experience and views of counsel; governmental participation; and reaction of the class members. *Officers for Justice*, 688 F.2d at 625. The degree of importance attached to each factor is determined by the nature of the claim, the type of relief sought and the facts and circumstances of each case. *Id.*

We find nothing in the record to indicate any abuse of discretion by the district court in approving the decree pursuant to Fed.R.Civ.P. 23(e). As a result of the fair-

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under the fairness provisions of Fed.R.Civ.P. 23(e), or whether it is confined to challenges under Title VII and the Constitution. *See Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983) (court is under mandatory duty to consider fairness to those affected, adequacy of settlement to the class, and public interest); *Moore v. City of San Jose*, 615 F.2d 1265, 1272 (9th Cir. 1980) (district court must inquire into effect of retroactive seniority provisions on incumbent employees). The Union does not assert any fairness challenge based on retroactive seniority. We do not decide the standing question. Rather, for purposes of this opinion we assume, without deciding, that the Union has standing to challenge the fairness of the consent decree.

ness hearing held December 22, 1987, the district court found the plaintiff-intervenors' case was strong; the City had many risks in continuing with litigation, including the risk of being found liable for intentional racial discrimination; discovery was virtually complete; trial on harassment issues would have been long and complex; and publication of evidence would have embarrassed and demoralized the SFFD. *Davis III*, 696 F.Supp. at 1305.

We conclude that the district court did not abuse its discretion in determining that the decree is fundamentally fair, adequate and reasonable.

B. *Constitutional and Statutory Considerations*

An affirmative action plan executed by a municipality constitutes state action and must comport with the equal protection provisions of the fourteenth amendment and Title VII. *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 517 n. 8, 106 S.Ct. 3063, 3072 n. 8, 92 L.Ed.2d 405 (1986). The district court set out in detail its constitutional and Title VII analysis. *See Davis III*, 696 F.Supp. at 1307-11.

It is well-settled that governmental bodies may constitutionally employ racial classifications essential to remedy a past practice of unlawful treatment of racial or ethnic groups subject to discrimination. *United States v. Paradise*, 480 U.S. 149, 166, 107 S.Ct. 1053, 1064, 94 L.Ed.2d 203 (1987) (affirming court-ordered hiring quotas to remedy past discrimination against minorities in hiring of state troopers). In doing so, both equal protection and Title VII concerns must be satisfied. To this end, there must be (1) adequate justification for the use of affirmative action, and (2) the decree must not unnecessarily burden the rights of the nonminority employees. *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616, 627-30, 107 S.Ct. 1442, 1449-51, 94 L.Ed.2d 615 (1987); *Higgins v. City of Vallejo*, 823 F.2d 351,

356-57 (9th Cir.1987), *cert. denied*, —— U.S. ——, 109 S.Ct. 1310, 103 L.Ed.2d 579 (1989).

1. Equal Protection

a. *Standard of Review*

Race-based remedies to alleviate past discrimination are subject to some level of elevated scrutiny to pass muster under the equal protection clause. *United States v. Paradise*, 480 U.S. at 166 & n. 17, 107 S.Ct. at 1064 & n. 17 (citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274, 106 S.Ct. 1842, 1847, 90 L.Ed.2d 260 (1986) ("means chosen must be 'narrowly tailored' to achieve a 'compelling government interest' ")). The Supreme Court recently adopted the *Wygant* plurality's strict scrutiny analysis in striking down a city ordinance which created a minority set-aside program for municipal construction contracts where it was not shown that the city had discriminated against minorities in the past. *City of Richmond v. J.A. Croson Co.*, —— U.S. ——, 109 S.Ct. 706, 721, 102 L.Ed.2d 854 (1989).

The district court properly employed the strict scrutiny analysis set forth in *Wygant*, and the "strong basis in evidence" standard articulated by Justice O'Connor in *Croson*. The district court also reviewed the decree to determine whether it was "narrowly tailored to serve a compelling governmental purpose." *Davis III*, 696 F. Supp. at 1301-02 (quoting *Paradise*, 480 U.S. at 166 & n. 17, 107 S.Ct. at 1064 & n. 17). The court concluded that the City had a valid "compelling governmental purpose" in adopting an affirmative action plan—"to remedy the City's pattern and practice of discrimination in hiring and promotion on the basis of race and sex." *Davis III*, 696 F.Supp. at 1307 (citing *Johnson*, 107 S.Ct. at 1452 [480 U.S. at 631-32]; *Paradise*, 107 S.Ct. at 1065 [480 U.S. at 167-70]).

b. *Justification*

The Union contends the evidence does not justify the decree's affirmative relief because most of the effects of discrimination that the decree was intended to remedy were alleviated by prior court action. The Union further argues there was insufficient evidence to justify the relief granted. The district court addressed these arguments in its order approving the decree. *See Davis III*, 696 F.Supp. at 1308. It found the arguments to be unpersuasive. *Id.* So do we.

i. Prior Relief

The Union argues that prior relief resulting from the *WACO* litigation precludes the affirmative relief afforded by the consent decree. The *WACO* litigation, however, involved discrimination only against Blacks in entry-level hiring. The *WACO* court enjoined the City from hiring based on invalid examinations, set lower cut-off scores for new examinations, and ordered one-for-one minority hiring which lasted from 1973 until a consent decree was signed in 1977. The *WACO* consent decree expired in 1982, contained no affirmative action provisions and set a hiring goal of 40% minorities for the makeup of the entry-level eligibility lists.

The litigation underlying the consent decree before us involves both entry-level hiring and promotions of Asians, Blacks, Hispanics and women. The *WACO* litigation, therefore, cannot provide relief to Asians, Hispanics or women who have been discriminated against at both the entry-level and promotion level, or to Blacks who have been discriminated against in promotions.

The Union's argument also overlooks the City's failure to comply with the *WACO* consent decree's mandate to formulate new, valid examinations. The Union contends that because the City permanently was enjoined from using invalid exams, and ordered to write valid ones,

the discrimination suffered by minorities and women resulting from past use of invalid exams was remedied, and there was no need for affirmative relief in the consent decree. We disagree.

In *Paradise*, the Supreme Court approved *court-ordered* affirmative relief where Alabama had consistently resisted court orders and had failed to live up to them. *Paradise*, 480 U.S. at 170-71, 107 S.Ct. at 1066-67. The Court found that "[t]he race-conscious relief at issue here is justified by a compelling interest in remedying the discrimination that permeated entry-level hiring practices and the promotional process alike." *Id.* at 170, 107 S.Ct. at 1066 (footnote omitted). The present situation is strikingly similar.

ii. Sufficiency of Evidence

The Union argues that because the court found insufficient evidence to justify court-ordered race-based hiring, the evidence is also insufficient to support voluntary hiring goals. The Union relies on a statement made by the court in a February 26, 1987 order in which the court enjoined the City from using invalid exams for promotions but declined to order mandatory hiring goals. We reject this argument.

The district court found that the statistical disparities between the numbers of minorities and women hired in the fire department and the numbers of minorities and women residing in the City constituted a "strong basis in evidence" sufficient to establish a *prima facie* case of past discrimination and justify the affirmative action provisions in the decree. *Davis III*, 696 F.Supp. at 1302. Because all hiring in the fire department is entry-level and non-skilled (all promotions occur from within the ranks), the court properly could rely on statistics to determine whether a *prima facie* case of discrimination had been made out to justify the relief granted. *Davis III*, 696 F.Supp. at 1302; *see Croson*, 109 S.Ct. at 725

(gross statistical disparities may constitute *prima facie* proof of pattern or practice of discrimination under Title VII, and are probative of pattern of discrimination where no special qualification necessary) (citing *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, 97 S.Ct. 2736, 2741-42, 53 L.Ed.2d 768 (1977)); *see also Wygant*, 476 U.S. at 286, 106 S.Ct. at 1853 (O'Connor, J., concurring) (dicta suggesting statistical disparity alone constitutionally may justify voluntary affirmative action); *Paradise*, 480 U.S. at 168 n.18, 107 S.Ct. at 1065 n. 18 (judicial determination of prior discriminatory policies and conduct satisfy first prong (justification) of strict scrutiny test).

There was sufficient evidence to justify the consent decree's affirmative action provisions.

c. *Narrowly Tailored*

A consent decree may be struck down if it is not "narrowly tailored" to meet its objectives. *Paradise*, 480 U.S. at 171, 107 S.Ct. at 1066-67. In determining whether race-based remedies are narrowly tailored, several factors must be considered: necessity for the relief; efficacy of alternative remedies; flexibility and duration of the relief; waiver provisions; relationship of any numerical goals to the relevant labor market; and impact of relief on third parties. *Paradise*, 480 U.S. at 171, 107 S.Ct. at 1066-67.

The Union argues that the decree is not narrowly tailored because it allows blind (unqualified) hiring; contains rigid, fixed quotas; lasts for an unreasonable period of time; contains long-term hiring goals numerically unrelated to past harm; and trammels the rights of nonminorities by failing to provide for the promotion of White firefighters and by uprooting promotion expectations.

For the reasons stated by the district court in its opinion, *Davis III*, 696 F.Supp. at 1309-11, we conclude that

these arguments, except as to the duration of the decree, are without merit. For the following reasons we hold that the duration of the decree must be modified.

In determining whether the duration of a decree is reasonable, courts look to the facts behind the decree. In *Paradise*, the Supreme Court upheld a court-ordered decree ordering one-for-one hiring of Blacks which had no ending date but terminated upon the development of promotion procedures which were not adverse to Blacks. *Paradise*, 480 U.S. at 178, 107 S.Ct. at 1070. The Court in *Paradise* approved the court-ordered relief which mandated that 50% of all promotions consist of Black candidates until 25% of the rank was Black, "but *only* until a promotion procedure without adverse impact on Blacks is in place." *Paradise*, 480 U.S. at 179, 107 S.Ct. at 1071. The district court in a prior order had mandated the hiring of 50% Black applicants until 25% of the state trooper force was Black. *Id.* The promotion order, therefore, reflected the percentage of Black troopers in the relevant labor market—the workforce. *Id.*

The present case presents a fact situation similar to *Paradise*, but involves a voluntary consent decree. The district court has ordered the hiring of minorities and women in percentages equal to their representation in the labor market—the City and County of San Francisco—and the promotion of minorities and women in percentages equal to their representation in the relevant labor market—the fire department. The decree does not, however, contain any provision to stop the use of its promotion mechanism when its valid promotion objectives have been met. To ensure that the result of the hiring and promotional procedures does not become unreasonable, we modify the seven-year duration of the decree to seven years or sooner upon the accomplishment of the objectives or the goals of the consent decree.

2. Title VII

a. *Manifest Imbalance*

Under a Title VII analysis, voluntary adoption of a race-based remedy may be justified by showing that a "manifest imbalance" exists, reflecting underrepresentation of women and minorities in "traditionally segregated job categories." *Johnson*, 480 U.S. at 631, 107 S.Ct. at 1452; *United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979). This standard assures "that sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination, and that the interests of those employees not benefiting from the plan will not be unduly infringed." *Johnson*, 480 U.S. at 632, 107 S.Ct. at 1452. The standard also prevents non-benefiting employees' rights from being "unduly trammeled" by the decree's provisions. *Id.* at 637, 107 S.Ct. at 1455.

To determine whether such an imbalance has occurred, the court may compare the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population. *Id.* Where the agreement is voluntary, the imbalance need not be sufficient to support a *prima facie* case of racial discrimination "since we do not regard as identical the constraints of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans." *Id.* Because such an imbalance is evident from the facts in this case, we conclude this branch of the Title VII test has been met.

b. *Nonminority Rights*

Where a finding of manifest imbalance justifies a consent decree's affirmative relief, the decree may be approved provided it does not "unnecessarily trammel the interests of the White employees" or creates an "absolute

bar to the advancement of White employees." *Johnson*, 480 U.S. at 637, 107 S.Ct. at 1455 (voluntary affirmative action plan, Title VII analysis); *Weber*, 443 U.S. at 208, 99 S.Ct. at 2730; *Higgins*, 823 F.2d at 357.

The Union asserts the decree unnecessarily trammels the rights of White nonminority firefighters because it does not require the promotion of any of them. We disagree. Affirmative relief may be implemented only to remedy harm caused by past discrimination. *See, e.g., Paradise*, 480 U.S. at 167, 107 S.Ct. at 1065 (government bodies may use race-conscious classifications where essential to remedy unlawful treatment of minority groups subject to discrimination). No evidence has been presented showing discrimination against nonminority, White or male firefighters. Therefore, it would not be appropriate for the decree to mandate their promotion.

The Union argues that advancement of nonminorities has been absolutely barred because the decree provides for the mandatory promotion of minorities[6] and precludes competition by nonminorities for the slots set aside for minorities. We disagree.

The mandatory promotion of thirty-three minorities was balanced by the optional promotion of forty-eight additional firefighters, 75% of whom were nonminorities. The Supreme Court in *Weber* held a voluntary affirmative action plan reserving 50% of job openings for Black workers to remedy past discrimination did not create an absolute bar to advancement of nonminority em-

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[6] The Union also argues that these mandatory promotions were not necessary because "there was no demonstrated or urgent need to make promotions before the new examinations were ready." This argument ignores the City's historical inability to devise an examination lacking adverse impact on minorities. The City also states in its brief that "there was a necessity for the Department to fill many vacanices in the position of lieutenant" when the consent decree was executed. This statement has not been refuted by the Union.

ployees because they could compete for the remaining 50% of job openings. *Weber*, 443 U.S. at 208, 99 S.Ct. at 2730. In the present case, only 25% of the forty-eight optional openings were reserved for minorities. In addition, preferential selection for promotions of minorities in the future will be based on the percentage of minorities in the relevant labor force—the fire department—allowing nonminorities to continue to compete for a large number of remaining positions.

We conclude that the decree meets the requirements of Title VII.

C. *Denial of Union's Request for Injunction*

The Union appeals the district court's denial of its motion to enjoin the City from assigning seniority to seventy-five lieutenants promoted on June 30, 1988, pursuant to paragraph sixteen of the consent decree. The Union alleges it has standing to challenge the assignments because the City used a new method to determine the seniority of the seventy-five lieutenants. The Union asserts the district court must hold a fairness hearing before the City can use the new seniority method.

The district court found the Union lacked standing to challenge the seniority method because the Union was not a party to the decree, and in the alternative found no merit in the Union's arguments. Without deciding the standing issue, we affirm the district court's determination that the Union's arguments regarding the modified seniority system were meritless.

The existing seniority system was not applied to the new lieutenants because it was based on rankings derived from performance on the invalid 1984 promotional exam. According to the Union's evidence,[7] under the revised

[7] Although the district court foreclosed the Union's presentation of evidence on the issue, the Union presented its evidence directly to this court when it filed a motion for a stay order on October 5, 1988. The motion was denied.

seniority method, the mandatory minority appointees were placed on the seniority list, with seniority among them determined by lot. The remaining discretionary appointees were then placed below the mandatory appointees, with their seniority also determined by lot. The Union argues that the discretionary appointees' rights were trammeled unnecessarily by the assignment of higher seniority to the Black, Hispanic and Asian lieutenants in the mandatory group. As support for this argument, the Union cites *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984). *Stotts*, however, is unhelpful to the Union. In *Stotts*, the Supreme Court overturned a district court order requiring the layoff of nonminorities with more seniority to assure that minorities with less seniority were not disadvantaged. *Stotts*, 467 U.S. at 579, 104 S.Ct. at 2588. Here, no incumbent lieutenant's seniority was affected by the manner in which seniority was assigned to the newly-promoted lieutenants. Rather, the new method was used only to assign seniority within the newly-promoted group. Thus, the district court did not abuse its discretion in finding the seniority method did not adversely impact the discretionary appointees.

PART TWO: THE 1988 INJUNCTION

I

BACKGROUND

We next consider the Union's appeal from the 1988 injunction. This injunction was issued following a contempt hearing in which the Davis plaintiffs had charged the City with violating the February 1987 injunction. The catalyst for the contempt hearing had been an incident involving a swastika placed in the office of two minority firefighters at an SFFD firehouse. At the hearing, the district court was presented with evidence concerning a number of other alleged discriminatory inci-

dents. In addition, the court received a report, under seal, from a court-appointed monitor regarding the swastika incident and other incidents of racial harassment. The court also heard oral testimony.

The injunction was filed February 5, 1988. It incorporated provisions of an internal general order of the SFFD dated October 22, 1987 ("SFFD General Order"), and charged specified supervisory officers of the SFFD "with the immediate responsibility of carrying out this order and insuring compliance with it by all members of the SFFD under their supervision directly or indirectly." Among other provisions, the injunction required "that each station house be inspected and that any racially inflammatory or sexually inflammatory materials be removed and destroyed [; and that] all station houses shall remain free of such materials." The injunction required prompt compliance with its terms, and specified that persons found guilty of violating it could be found in contempt of court and fined or imprisoned, or both.

The Union challenges the injunction on the grounds that it improperly incorporates by reference material from the SFFD General Order, was issued without proper findings of fact, and is not supported by substantial evidence.

II

ANALYSIS [8]

The decision to grant or deny injunctive relief is reviewed for abuse of discretion. *S.E.C. v. Arthur Young & Co.*, 590 F.2d 785, 787 (9th Cir.1979). Conclusions of law upon which the injunction is based "are freely reviewable." *Sports Form, Inc. v. U.P.I.*, 686 F.2d 750, 752 (9th Cir.1982).

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[8] The Union lists among the issues presented to this court the question whether the 1988 injunction qualifies as an "order granting an injunction" for section 1292(a)(1) jurisdictional purposes. The Union correctly argues that it is such an order. We conclude that we have appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

A. *Incorporation of the SFFD General Order*

Federal Rule of Civil Procedure 65(d) by its terms prohibits incorporation by reference of another document into an injunctive order.[9] The Union argues that the incorporation by the district court of sections of the SFFD General Order into its 1988 injunction violated Rule 65(d) and was an abuse of discretion which requires reversal.

The law of this circuit is that "[o]rdinarily, an injunction should not incorporate by reference another document." *Henry Hope X-Ray Products, Inc. v. Marron Carrel, Inc.*, 674 F.2d 1336, 1343 (9th Cir.1982). The Union cites language in the opinions of other circuits which appears to read the incorporation requirement very strictly. *See, e.g., Thomas v. Brock*, 810 F.2d 448, 450 (4th Cir.1987) (the requirements of rule 65(d) "are mandatory and must be observed in every instance") and *H.K. Porter Co., Inc. v. National Friction Products Corp.*, 568 F.2d 24, 27 (7th Cir.1977) (ignoring rule's mandatory requirement serious and decisive error). This circuit, however, has not taken a rigid approach to Rule 65(d). For example, in *Henry Hope X-Ray*, we held that the district court did not err in failing to attach a confidential appendix to its order, where the appendix was transmitted to the parties. *Henry Hope X-Ray*, 674 F.2d at 1343.

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[9] Rule 65(d) provides:

> Every order granting an injunction and restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Fed.R.Civ.P. 65(d).

The primary purpose of Rule 65(d) is to assure adequate notice to parties faced with the possibility of contempt. *Henry Hope X-Ray*, 674 F.2d at 1343. *See also International Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76, 88 S.Ct. 201, 208, 19 L.Ed.2d 236 (1967). Here, the document incorporated into the 1988 injunction consisted of fire department rules already binding upon the officers of the SFFD. It is unlikely the officers could argue they were unaware of these rules.

We conclude that the district court's failure to cause a copy of the SFFD General Order to be stapled to the 1988 injunction does not require reversal of the court's grant of the injunction.[10] In view of the language of Rule 65(d), however, by separate order filed herewith we order that copies of the incorporated SFFD General Order be attached to the 1988 injunction and served upon the affected parties.

B. *The District Court's Findings*

The Union also contends that the district court failed to comply with Fed.R.Civ.P. 52(a),[11] which requires the trial court to set forth findings of fact and conclusions of law supporting any order granting an injunction; and that as a result we should reverse the order granting the 1988 injunction.

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[10] The Union argues that because the SFFD General Order is subject to revision by the City at any time, adequate notice of what is enjoined is unattainable. The 1988 injunction, however, refers specifically to the SFFD General Order dated October 22, 1987, and not to the SFFD General Order "as revised."

[11] Federal Rule of Civil Procedure 52(a) provides in relevant part:

> . . . in granting or refusing interlocutory injunctions the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action.

Fed.R.Civ.P. 52(a).

"Failure to comply with Rule 52(a) does not require reversal unless a full understanding of the question is not possible without the aid of separate findings." *See Vance v. American Hawaii Cruises, Inc.*, 789 F.2d 790, 792 (9th Cir.1986). Thus we will affirm "if the findings are sufficiently comprehensive and pertinent to the issues to provide a basis for decision." *Id.*

The rule specifically permits the district court to make its findings orally. *See* Rule 52(a). The district court's oral findings are accurately restated in its subsequently published opinion in *Davis III*, 696 F.Supp. at 1297-98. In essence, the district court found that foot-dragging by the SFFD in enforcing its own internal order and the district court's February 1987 injunction required the district court to order SFFD officers to act more expeditiously in investigating and punishing alleged incidents of wrongdoing. The district court felt there was a need to make the officers of the SFFD directly answerable to the court. That this was the basis for imposing the injunction is plainly apparent from the record. Our appellate review is not impeded by the manner in which the district court made its findings. We conclude that Rule 52(a) has been satisfied. *See Dekar Industries, Inc. v. Bissett-Berman Corp.*, 434 F.2d 1304, 1305 (9th Cir. 1970), *cert. denied*, 402 U.S. 945, 91 S.Ct. 1621, 29 L.Ed.2d 113 (1971).

C. *Sufficiency of Evidence*

The Union argues that the 1988 injunction should be overturned because the evidence presented at the January 14, 1988 hearing was insufficient to support a finding of *contempt*. The district court, however, made no finding of contempt. The injunction is an order which threatens contempt, after a hearing, in the event of future misconduct. Whether there was sufficient evidence for a finding of contempt is irrelevant.

Even if the Union's argument is read to raise the question of sufficiency of the evidence regarding "foot-

dragging" by the SFFD, the district court did not abuse its discretion in issuing the injunction. The court had been involved in this case for years, and was extremely familiar with its history. *See generally Davis III*, 696 F.Supp. 1287. In addition, ample evidence of foot-dragging was presented in the report of the court monitor and through Chief Phipps' testimony at the hearing.[12]

D. *Due Process*

Finally, the Union urges reversal on the ground that issuance of the injunction violated the due process rights of the officers charged with carrying out its mandate. The Union contends that because these officers "had no opportunity to appear at the hearing in their individual capacities and present personal defenses to the granting of the [injunction]," their due process rights were violated.

This argument is based on an out-of-context quotation from Wright & Miller which is completely inapposite here. *See* 11 C. Wright & A. Miller, *Federal Practice and Procedure* §§ 2956 at 568 (1973). The passage does not suggest, as the Union argues, that the individual officers bound by the court's order need have appeared at the January 14, 1988 hearing to be properly bound by the 1988 injunction. The officers are employees of the City, a party to this litigation, and as such are enjoinable under Rule 65(d). The Wright & Miller quotation explains why *notice* to such employees is necessary, but also why they need *not* necessarily appear personally to be bound.

The Union also argues that the language of the injunction is overbroad and so vague that it violates the

[12] The Union questions the competency of some of the evidence presented at the hearing, specifically affidavits presented to the district court alleging numerous incidents of discrimination and harassment. But the district court seemed to rely primarily, if not exclusively, on the testimony of Chief Phipps and the monitor's report, neither of which is challenged here. *See Davis III*, 696 F.Supp. at 1297-98.

due process rights of the officers. This argument is premature. No due process violation has occurred. At such time as enforcement of the injunction may be sought, officers affected may present this argument, along with any other defenses they may have, including any evidence of inability to comply or good faith attempts at compliance. *See NAACP, Jefferson County Branch v. Brock*, 619 F.Supp. 846, 849-50 (D.C.D.C.1985); *Aero Corp. v. Dept. of Navy*, 558 F.Supp. 404, 428 (D.C.D.C. 1983).

We conclude that the district court did not abuse its discretion in granting the 1988 injunction.

PART THREE: REQUEST FOR ATTORNEY FEES ON APPEAL

The Davis plaintiffs seek attorney fees for this appeal pursuant to section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988, and Ninth Circuit Rule 28-2.3.

Under section 2000e-5(k), "the court . . . may allow the prevailing party . . . a reasonable attorney's fee as part of costs. . . ." The appellate court has discretion to award attorney fees on appeal to prevailing parties as part of costs in Title VII cases. *Harmon v. San Diego County*, 736 F.2d 1329, 1331 (9th Cir.1984) (fee awards may be awarded for time spent on appeal to prevailing parties).

The Supreme Court recently considered whether attorney fees may be awarded against a third party intervenor in a Title VII action. *Independent Federation of Flight Attendants v. Zipes*, —— U.S. ——, 109 S.Ct. 2732, 2733, 105 L.Ed.2d 639 (1989). The Court held that attorney fees should be awarded against an intervenor only where the intervenor's actions were "frivolous, unreasonable, or without foundation." *Id.* 109 S.Ct. at 2736. Here, as in *Zipes*, the Union intervened to protect the in-

terests of incumbent employees, an act that was neither frivolous, unreasonable or without foundation. *Id.* at 2738-39. Following the reasoning in *Zipes*, we decline to award attorney fees as costs to Davis for this appeal.

CONCLUSION

The district court did not abuse its discretion in concluding that the consent decree is fundamentally fair, adequate and reasonable and comports with the equal protection provisions of the fourteenth amendment and the requirements of Title VII. We modify the decree's term, however, to seven years or earlier upon the achievement of its goals and objectives.

The district court did not err in denying the Union's motion to enjoin the City from assigning seniority to firefighters promoted pursuant to the terms of the consent decree.

The district court did not abuse its discretion in granting the 1988 injunction.

The Davis plaintiffs' request for attorney fees for this appeal is denied.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
N.D. CALIFORNIA

Nos. C-84-7089 MHP, C-84-1100 MHP

UNITED STATES OF AMERICA,
Plaintiff,

v.

THE CITY and COUNTY OF SAN FRANCISCO, *et al.*,
Defendants,

and

SAN FRANCISCO FIREFIGHTERS LOCAL 798, *et al.*,
Defendants in Intervention.

FONTAINE DAVIS, *et al.*,
Plaintiffs in Intervention,

v.

THE CITY and COUNTY OF SAN FRANCISCO, *et al.*,
Defendants,

and

SAN FRANCISCO FIREFIGHTERS LOCAL 798, *et al.*,
Defendants in Intervention.

June 10, 1988

Eva Jefferson Paterson, San Francisco Lawyers' Committee for Urban Affairs, William C. McNeill, III, Shauna

I. Marshall, Equal Rights Advocates, Denise M. Hulett, Mexican-American Legal Defense & Education Fund, San Francisco, Cal., Russell Galloway, Berkeley, Cal., Mary Dunlap, Edwin M. Lee, William Tamayo, Michael J. Wong, Asian Law Caucus, Inc., San Francisco, Cal., for plaintiff-intervenors.

Duane W. Reno, Susanne L. Clerc, Davis, Reno & Courtney, San Francisco, Cal., for defendant-intervenor Local 798.

Robert T. Moore, U.S. Dept. of Justice, Civil Rights Div., Washington, D.C.

Joann Swanson, Department of Justice, San Francisco, Cal.

Barbara Phillips, Monitor, Rosen & Phillips, San Francisco, Cal.

Dan Siegel, Chief of Complex Litigation, Office of the City Atty., San Francisco, Cal., for defendants City and County of San Francisco, et al.

MEMORANDUM AND ORDER APPROVING CONSENT DECREE

PATEL, District Judge.

This employment discrimination action was originally brought by the United States against the City and County of San Francisco ("the City") citing the illegal practices of the San Francisco Fire Department ("SFFD"). Various individuals and organizations have since intervened as plaintiffs [1] and San Francisco Firefighters Local 798

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[1] Plaintiff-intervenors are: Fontaine Davis, Eric H. Washington, Jerilyn North, Robert L. Demmons, Jimmie Braden, Audry Lee, Early Davis, Brandi Swanson, Susan Moorehead, Anne Young, Mary M. Carder, Theresa Rodigou, Kathleen J. Bradshaw, Patricia Murray, Chinese for Affirmative Action (CAA) and the Mexican American Legal Defense Fund (MALDEF).

("the Union")[2] has intervened as a defendant. After over four years of litigation, following a change in the political administration of the City which necessitated the postponement of trial, plaintiff-intervenors and the City reached a settlement of both the individual and the class-wide claims of discrimination against women and minorities and memoralized it in a proposed consent decree. The United States declined to participate in the negotiations leading to settlement. The Union, although it took part in settlement negotiations, objects to the terms of the decree and did not sign the agreement.

The case is now before the court for approval of the consent decree. Approval of the decree is opposed by the United States[3] and by the Union. The court has also considered the objections filed by members of the public in opposition to the provisions of the decree. In addition, a fairness hearing was held on December 22, 1987 at which counsel for all the parties argued the merits of the decree and the court entertained the statements of various

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[2] Because of the anomalous circumstance in the SFFD that all members of the department including those in supervisory ranks are members of the Union, the SFFD's interests are virtually indistinguishable from those of the Union.

[3] The objections to the consent decree of the United States will be considered only insofar as they raise issues of conflict between the permanent injunctive relief awarded by the court in *United States v. City and County of San Francisco*, 656 F.Supp. 276, 289-92 (N.D.Cal.1987), and the terms of the decree. The government's claims in this action were completely resolved in that order and relief was granted.

The United States cannot waltz in and out of this action at will. Since the entry of the permanent injunction, the government has not actively participated in this case. Though invited, the government chose not to join in the negotiations for the consent decree. Accordingly, the government has no standing to object to the provisions of the decree except as they abridge or conflict with the rights granted the United States pursuant to the injunction. The government is deemed to have waived its right to object on any other basis.

firefighters both for and against the decree. Having considered the submissions of the parties and the objections filed with the court and raised at hearing, for the following reasons, the court approves the consent decree in settlement of all classwide and individual claims for relief raised both in this action and in the concurrent state action, *City and County of San Francisco v. Fair Employment and Housing Commission* [*FEHC*], No. A024145.[4] The Stipulation of Undisputed Facts [hereinafter "Stipulation"] filed August 15, 1986 and the Statement of Undisputed Facts [hereinafter "Facts"] filed November 12, 1987 are deemed facts found by the court and incorporated herein except as otherwise noted.

BACKGROUND

The SFFD hired no Black firefighters before 1955,[5] allowed no women to apply before 1976 and hired no women until August 1987. Facts paras. 5, 2 and 1. It is unsurprising then that this action is not the first challenge faced by the City to employment practices of the SFFD. This litigation must be understood in conjunction with an earlier federal suit, *Western Addition Community Organization* [*WACO*] *v. Alioto*, C 70-1335 WTS and a concurrent state action, *City and County of San Francisco v. Fair Employment and Housing Commission* [*FEHC*], No. A024145.[6] The *WACO* suit challenged only the

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[4] See *infra*, Background Part II at 13. A representative of the FEHC appeared at the fairness hearing and informed the court that the FEHC had considered the terms of the decree, found it to be a fair way of resolving the discrimination in the SFFD past, present and future, and had voted to accept the terms of the decree in lieu of the relief it had ordered in 1982.

[5] There are no records to indicate whether any Hispanic, Asian or Filipino firefighters were employed by the SFFD before Earl Gage, the City's first Black firefighter, was hired in 1955. The next Black firefighter was not hired until 1967. Facts para. 5.

[6] This court may take judicial notice of and consider the record in both the *WACO* and *FEHC* litigations regarding the discriminatory

SFFD's *entry-level* hiring practices and only on grounds of racial discrimination. The *FEHC* suit challenged only *promotional* practices. The current litigation addresses both entry-level and promotional practices as well as problems of both gender and race discrimination in employment.

I. *Previous Federal Litigation: The Entry-Level Test*

Although Blacks represented 14% of the City's population in 1970, of the 1800 uniformed firefighters employed by the SFFD only four were Black.[7] *Western Addition Community Org.* [*WACO*] *v. Alioto*, 330 F.Supp. 536, 538 (N.D.Cal.1971) [hereinafter "*WACO I*"]. That year the NAACP in concert with several community groups filed a class action suit[8] in this court against the City pursuant to the Civil Rights Act, 42 U.S.C. §§ 1981 and 1983,[9] to challenge the validity of the format used for the 1968 H2 entry-level firefighter test. *WACO I*, 330 F. Supp. at 537.

The 1968 H2 test determined eligibility for entry-level positions in the SFFD. The test comprised six compo-

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practices of the City. *See United States v. City and County of San Francisco*, 656 F.Supp. 276, 285 n. 9 (N.D.Cal.1987); *In re A.H. Robbins Co.*, 107 F.R.D. 2, 12 (D.Kan.1985).

[7] By 1973, although minority representation on the SFFD remained largely the same, minority representation was up to 65% in the City's high schools. *See Western Addition Community Group* [*WACO*] *v. Alioto*, 369 F.Supp. 77, 79 n. 1 (N.D.Cal.1973), *appeal dismissed as moot*, 514 F.2d 542 (9th Cir.), *cert. denied*, 423 U.S. 1014, 96 S.Ct. 446, 46 L.Ed.2d 385 (1975).

[8] Although the court certified the class only for purposes of settlement, the action proceeded as a class action.

[9] The provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000è et seq., did not become applicable to public employers until 1972. *Johnson v. Transportation Agency*, 480 U.S. 616, —— n. 6, 107 S.Ct. 1442, 1449-50 n. 6, 94 L.Ed.2d 615 (1987). Thus, the *WACO* suit was originally brought on equal protection grounds.

nents: physical measurement; athletic ability; medical examination; qualifications appraisal; employment, character and background check; and a written examination. Success on the first five components determined that an applicant was qualified. Only the written examination score determined an applicant's rank on the Civil Service list of eligibles. *Id.* at 538. According to Civil Service rule, hiring was by rank order from the eligibility list.[10] The *WACO* plaintiffs challenged only the written component of the 1968 H2 test.

The *WACO* plaintiffs charged that the 1968 H2 written exam had an adverse impact on minority applicants without having any relationship to the requirements of the job. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). The results of the written portion of the 1968 H2 test were as follows:

	Tested	Passed	Pass Rate
Total	1883	662	35%
Black	101	12	12%
Hispanic	69	24	35%
Other[11]	1713	626	37%

See WACO I, 330 F.Supp. at 538; Facts para. 13. Thus, the pass rate for Black applicants on the 1968 H2 written

[10] Each eligibility list had an expiration date so that not all applicants who qualified and made the list had a reasonable hope of being hired. Generally, the list expired before it was exhausted. Thus the written exam, which established ranking, was the most significant portion of the test.

[11] This figure was assumed both by Judge Sweigert, *see WACO I*, 330 F.Supp. at 538; *Western Addition Community Group [WACO] v. Alioto*, 340 F.Supp. 1351, 1352 (N.D.Cal.1972), and the parties to the proposed consent decree, *see* Facts para. 13, to represent the number of White applicants who took and passed the 1968 H2 test's written exam. This figure probably also represents Asian and Filipino applicants. The record, however, demonstrates a historical pattern of extremely low representation of these minorities in the applicant pool such that the failure to separate representation of these groups is unlikely to skew the numbers greatly for purposes of comparison.

exam was about one-third that of White applicants. Facts para. 13.

In 1971 Judge Sweigert found that the plaintiffs had demonstrated that the 1968 H2 test had an adverse impact on minorities and that the City had failed to carry its burden to show any connection between the qualities tested on the written exam and the job requirements of an entry-level firefighter.[12] *WACO I*, 330 F.Supp. at 539-40. In defense of the exam, the City responded only that the SFFD had made efforts to recruit minority applicants for the 1968 H2 test. The court ruled that "whatever may have been the good intentions of defendants, there is a prima facie case for predicating employment discrimination." *Id.* at 539.[13]

A revised H2 entry-level test was administered in September 1971. The 1971 H2 test comprised three parts given in two stages. The first stage required the applicant to pass a written examination by answering 90 out of 130 questions correctly. If the applicant passed the written exam, he then had to pass an athletic ability exam and an oral exam. The results of the second stage exams determined an applicant's rank on the eligibility list. *Western Addition Community Org.* [*WACO*] *v. Alioto*, 340 F.Supp. 1351, 1352 (N.D.Cal. 1972) [hereinafter "*WACO II*"]. The WACO plaintiffs again came before the court in 1972 seeking to enjoin, on the grounds of adverse impact, the use of the resulting eligibility list. The results of the written portion of the 1971 H2 test were as follows:

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[12] The 1968 H2 written exam tested for knowledge of mathematics, verbal skills, and reading comprehension (47%); mechanics (16%); basic chemistry and physics (11%); situational responses (13%); and basic first aid and bodily functions (13%). *WACO I*, 330 F.Supp. at 539.

[13] The court declined, however, to enjoin preliminarily the further use of the 1968 H2 test format in the belief that modifications proposed by a Civil Service Task Force and filed with the court would eliminate any grounds for controversy. *WACO I*, 330 F.Supp. at 540 and Appendix.

	Tested	Passed	Pass Rate
Total	1741	831	48%
White	1187	676	57%
Black	333	67	20%
Hispanic/Asian	221	88	40%

WACO II, 340 F.Supp. at 1353. Thus, instead of eliminating adverse impact, the 1971 H2 test only perpetuated the 1968 H2 test's approximately three-to-one passing advantage of White over Black applicants.

The court held that the 1971 H2 entry-level test had an adverse impact on minority applicants and was not shown to be job-related. Specifically, the court found that the City was unable to validate[14] the 1971 H2 test because it had not, in the first instance, conducted a job analysis. Because there was no way of knowing what the job required, there was no way to determine whether the test was reasonably related to job requirements. *See WACO II*, 340 F.Supp. at 1356. After noting that the City's own experts had "virtually confessed" that validation was impossible and affirming the City's good intentions while bemoaning its failure "to comply with the fairly well-established requirements of the law in this field," the court enjoined the use of the 1971 H2 entry-level firefighters exam and the resulting eligibility list. *WACO II*, 340 F.Supp. at 1356; Facts para. 14.

In 1973 the City presented the court with a new written test, which it claimed to have properly validated. The court found that although the City had conducted a job analysis substantially in accordance with federal guidelines, it had failed entirely to validate the written test empirically (as required by the guidelines if feasible) and further that it had not shown the adequacy of the attempted content validation. *Western Addition Community*

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[14] Validation is the process of demonstrating that a test which is shown to have an adverse impact is nevertheless significantly related to on-the-job performance. For an explanation of different types of validation, *see WACO II*, 340 F.Supp. at 1354-55.

Org. [*WACO*] *v. Alioto*, 360 F.Supp. 733, 739 (N.D.Cal. 1973) [hereinafter "*WACO III*"]. Judge Sweigert refused to approve the written exam and issued the following admonishment to the City:

> The time has come—especially after the City has twice failed to satisfactorily demonstrate the validity of its Fireman H-2 written examination tests—for the City to seriously, rather than superficially and speciously, face up to the problem presented to it by new federal law by further efforts to rebut or correct the already legally established *presumptive* discriminatory effect of its selection procedures.

WACO III, 360 F.Supp. at 739 (emphasis in original). The court declined at that time to order affirmative race-conscious relief. It did order, however, that the written portion of the proposed test not be used for cut-off or ranking purposes and also ordered the City to proceed apace to validate empirically either the test under consideration or a new test. *WACO III*, 360 F.Supp. at 740-41.

In June 1973, the *WACO* plaintiffs moved for and were granted affirmative relief. *Western Addition Community Org.* [*WACO*] *v. Alioto*, 369 F.Supp. 77 (N.D.Cal.1973) [hereinafter "*WACO IV*"], *appeal dismissed as moot*, 514 F.fl2d 542 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 1014, 96 S.Ct. 446, 46 L.Ed.2d 385 (1975). The court found that the City had failed three times to demonstrate that the challenged H2 tests were job-related. The appropriate remedy for such repeated failures to comply with the law and with court orders was affirmative relief "even though it cannot be established that the discriminatory practices were intentional or invidious." *WACO IV*, 369 F.Supp. at 79.

The court directed its exasperation at the City's Civil Service Commission ("the Commission"), pointing out that the Commission's failure to comply with the order

in *WACO III* had resulted in the SFFD being over eleven percent understaffed.

> The Commisson's dilatoriness in these matters and apparent stubborn insistence upon arguments and alternatives which this court has repeatedly found unacceptable, have created an intolerable situation; the adequacy of Fire Department manpower for the safety of the City is coming into question; all Fireman H-2 applicants, both minority and non-minority, have been kept in a state of uncertainty for several years and the rights of minority applicants to a more prompt correction of the City's still unvalidated selection procedures are involved.

WACO IV, 369 F.Supp. at 80. Judge Sweigert ordered one-for-one White to minority hiring from the 1973 H2 list (identified as list E-25), regardless of rank, until the list of qualified minority applicants (consisting of those who had answered at least 50 of the 100 questions on the written exam correctly and passed the oral and athletic tests) was exhausted. *Id.* at 80-81; Facts para. 27.

In early 1974, the SFFD substantially modified the ongoing evaluation of participants at the Fire College. The Fire College, established in 1957, provides several weeks of required training and practical instruction to newly appointed H2 firefighters. Between 1957 and 1972, only two firefighters were ever dismissed based on inadequate performance at the Fire College. In 1974, however, the Fire College program was revised to include weekly testing of ability to manipulate fire equipment and a procedure was instituted for dismissal of those who failed the program. Stipulation paras. 56-61.

The *WACO* litigation was terminated by consent decree in May 1977. Facts para. 31. The decree was to be in

effect for five years.[15] The decree reiterated the court's earlier finding that the plaintiffs had made out a prima facie case of race and national origin discrimination. In addition, the decree noted the court's finding that the City had failed to carry its burden to explain the disparate impact of its selection procedures upon minority applicants. *See Western Addition Community Org. [WACO] v. Alioto*, No. C-70-1335 WTS, slip op. at 2 (N.D.Cal. May 18, 1977) [hereinafter "*WACO V*"]. The decree established guidelines for the use of exam components from the newly announced (1976) H2 test. It included no provision for affirmative relief on the grounds that "[i]n view of the agreement of the parties and the defendants' efforts of improving the selection process for entry-level firefighter, there is no need for nor would it be appropriate to impose a further ratio or quota hiring order upon defendants." *WACO V*, slip op. at 9. The decree did state as a goal of the parties, however, that the H2 eligible list should reflect 40% minority representation. *Id.* at 9-10.

The 1976 H2 test used the 1973 written exam with a cut-off score of 70% and a weight of 40% in ranking for the eligibility list. In addition, applicants were required to pass a physical agility test ("PAT") that was weighted 60% in ranking. According to Civil Service rule, appointments from the resulting list of eligibles (list E-26) were to be made in rank order. Facts para. 30. The pass rates for the written portion of the 1976 H2 test were as follows:

	Tested	Passed	Pass Rate
Total	3386	2642	78%
White	1995	1761	88%
Black	562	306	54%
Hispanic	462	319	69%
Asian	289	202	70%
Am. Ind./Other	78	54	69%

[15] The parties to the instant action have agreed that the *WACO* consent decree expired in 1982.

See Facts para. 32. The rate of Black to White applicants passing the 1976 H2 test was 61%, the rate of Hispanic to White applicants passing the test was 78% and the rate of Asian to White applicants passing the test was 80%.

In 1978, the *WACO* plaintiffs raised an objection to the use of the 1976 test. Judge Sweigert rejected their objection because the City had comported with the express terms of the consent decree. *See Western Addition Community Org. [WACO] v. Alioto*, No. C-70-1335 WTS, slip op. at 2 (N.D.Cal. June 9, 1978 [hereinafter "*WACO VI*"].

As of November 1987, fourteen years after Judge Sweigert's 1973 order granting affirmative relief and ten years after the entry of the *WACO* consent decree, over 55% of the minority firefighters working in the SFFD had been hired pursuant to Judge Sweigert's 1973 order. Facts para. 28.

Thus, while the *WACO* consent decree ameliorated some of the disparate impact on minorities of the SFFD's entry-level hiring practices, it was by no means a complete resolution. It is therefore no surprise that the City has since had to defend the hiring and promotional practices of the SFFD before both state and federal courts.

II. *Prior State Court Litigation: The Promotional Test*

All positions above the rank of H2 firefighter (except that of Chief) are filled by promotion from within the SFFD.[16] Of the 352 permanent supervisory positions in the SFFD, none are held by women, none are held by Asians, four (1%) are held by Blacks and 16 (5%) are held by Hispanics. Only one member of a minority group holds a rank above captain. *See* Facts paras. 7-9.

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[16] This entirely internal promotion procedure is enforced by a time in grade requirement. That is, to be eligible for any rank above H2 firefighter, the applicant must have completed a probationary period in the ranks below. Stipulation at paras. 51, 52.

The first rank in the SFFD above H2 entry-level firefighter is H20 fire lieutenant. Before 1982, the H20 test for promotion to the rank of lieutenant consisted solely of a written job knowledge exam. Facts para. 33. The 1978 lieutenant's exam tested for knowledge of firefighting strategy and technique, arson detection, equipment maintenance, rescue and emergency medical procedures, and report writing. *See City and County of San Francisco v. Fair Employment and Housing Comm'n* [*FEHC*], 191 Cal.App.3d 976, 980-81, 236 Cal.Rptr. 716 (1987) [hereinafter "*FEHC*"]. Rank on the eligibility list (which listed only the top 250 applicants [17]) was determined by a combination of an applicant's score on the written exam, his seniority, his record of meritorious service and his "clean record" points. Facts para. 33. For the 1978 H20 test, an applicant's score on the written exam counted 85% and the remaining factors counted 12% in determining rank on the eligibility list. Facts para. 34. The results of the 1978 H20 test for fire lieutenant were as follows:

	Tested	Passed	Pass Rate	Aptd	Apmt Rate [18]
Total	577	250	43%	153	27%
White	473	226	48%	140	30%
Black	34	6	18%	3	9%
Hispanic	54	17	31%	10	19%
Asian/Other	16	1	6%	0	0%

See Facts para. 35.[19] Thus, the ratio of the pass rate of the minority subgroup to the pass rate of White fire-

[17] Of the 250 on the list of eligibles, however, only the top 160 had a chance of promotion during the four years before the list expired. *FEHC*, 191 Cal.App.3d at 981 n. 3, 236 Cal.Rptr. 716.

[18] Appointment rate is the percentage appointed of all those tested, rather than the percentage appointed of only those who passed the test.

[19] The parties' stipulated facts isolate the numbers of minorities differently than did the California Court of Appeal. The differences are not significant. See *FEHC*, 191 Cal.App.3d at 981, 236 Cal.Rptr. 716.

fighters on the 1978 H20 test was 38% for Black firefighters, for Hispanic firefighters it was 65% and for Asian Other firefighters it was 13%.

Between June and September of 1980, Black firefighters filed ten complaints with the California Department of Fair Employment and Housing ("the Department") alleging that the SFFD's 1978 H20 test discriminated on the basis of race. Facts para. 36. The Department issued a formal complaint and an administrative hearing ensued. *FEHC*, 191 Cal.App.3d at 981, 236 Cal.Rptr. 716. The Fair Employment and Housing Commission ("the FEHC")[20] determined on the basis of the hearing record that the 1978 H20 test had an adverse impact on minority applicants and that the City had failed to show that the test was sufficiently job-related to be valid.[21] *Id.* at 982, 236 Cal.Rptr. 716. Although the City obtained a writ of administrative mandamus from a California superior court vacating the decision of the FEHC, the Court of Appeal subsequently concluded that the FEHC's findings were supported by substantial evidence and reversed the superior court's judgment. *Id.* at 982, 990, 994 236 Cal. Rptr. 716. The decision of the Court of Appeal became final and this court has held that the decision has preclusive effect in this litigation.[22] Order of May 25, 1988 (confirming bench order of October 21, 1987).

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[20] The Department prosecutes cases and the FEHC adjudicates them. *FEHC*, 191 Cal.App.3d at 981 n. 4, 236 Cal.Rptr. 716.

[21] The FEHC enjoined the City from promoting from the 1978 H20 list of eligibles; ordered the immediate promotion with back pay of four Black firefighters; ordered the promotion of six more Black firefighters within one year; and ordered the promotion of one Black for every five non-Black promotions until the City arrived at and administered a job-related promotional H20 test. *FEHC*, 191 Cal.App.3d at 982, 236 Cal.Rptr. 716. The Court of Appeal, however, vacated this portion of the FEHC's order and deferred the award of relief to this court in order to avoid the possibility of inconsistent awards of relief. *Id.* at 992-94, 236 Cal.Rptr. 716.

[22] Analysis of disparate impact under the California Fair Employment and Housing Act is identical to Title VII analysis and Title

The Court of Appeal held that the Department had established a prima facie case of discrimination by demonstrating a significant disparity between the passing rates of White and Black applicants. The significance of the disparity in passing rates was determined by reference to the Uniform Guidelines on Employee Selection Procedures ("the Uniform Guidelines"), 29 C.F.R. § 1607.1 et seq.[23] *FEHC*, 191 Cal.App.3d at 986-87, 236 Cal.Rptr. 716. The rule of thumb under the Uniform Guidelines provides that a selection rate (among minority applicants) of less than 80% of the rate of the group with the highest selection rate (usually White applicants) is considered to be strong evidence of adverse impact. 29 C.F.R. § 1607.4(D). The 38% passage rate of Black as compared with White firefighters on the 1978 H20 test was obviously far below the 80% rate suggested by the Uniform Guidelines. The Court of Appeals found the likelihood that the adverse impact was happenstance to be slight. *FEHC*, 191 Cal.App.3d at 987, 236 Cal.Rptr. 716.

The court rejected the arguments raised by the City to account for the disparity in passing rates. First the City argued that job experience rather than race accounted for most of the disparity in passage rates of Black and White applicants. The court found that the Department's statisticians had accounted for differences in seniority, service as a temporary lieutenant and prior simulator training experience only to find that these factors could not explain the disparity in passing rates. *FEHC*, 191 Cal.App.3d at 988-89, 236 Cal.Rptr. 716. The City also tried to argue that the Black applicants were

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VII analysis was in fact employed by the Court of Appeal in *FEHC*. *FEHC*, 191 Cal. App.3d at 985-86, 236 Cal.Rptr. 716.

[23] The Uniform Guidelines were jointly adopted in 1978 by the Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor and the Department of Justice. 29 C.F.R. § 1607.1(A).

less capable than their White counterparts because 73% of them had been hired pursuant to the *WACO IV* hiring order. See 369 F.Supp. at 81. The court found that this argument was not only without factual support, it was in fact contradicted by evidence that all the applicants were highly experienced and had demonstrated success by surviving a stringent training program. *FEHC*, 191 Cal. App.3d at 989, 236 Cal.Rptr. 716. Finally, the court dismissed the City's argument that the Black candidates had failed to prepare adequately for the test. *Id.*

Once the court determined that there was substantial evidence to support the FEHC's finding of adverse impact, it turned to the question of whether the City had demonstrated that the test was job-related. It concluded that there was substantial evidence to support the FEHC's findings that the 1978 H20 test was unrelated to the job and wholly unvalidated. *Id.* at 990, 236 Cal. Rptr. 716. The FEHC had found that although supervision was the primary component of the fire lieutenant's job, ability to supervise was nowhere listed in the job description, nor was it tested for in the 1978 H20 test. The City had presented no evidence demonstrating a correlation between higher test scores and job performance. *Id.* The Court of Appeal pointed out that such empirical validation could have been obtained easily because many of the questions on the 1978 H20 test had been taken from earlier H20 tests. *Id.* at 990-91, 236 Cal. Rptr. 716. The FEHC concluded that written tests are an inappropriate measure of supervisory skills and the Court of Appeal agreed. *Id.* at 990, 236 Cal.Rptr. 716.

Recognizing the overlap between the state case and this litigation, the Court of Appeal sought to avoid the possibility of inconsistent awards and so vacated the relief ordered by the FEHC [24] and deferred relief pending the outcome of this litigation. *Id.* at 944, 236 Cal.Rptr. 716.

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[24] See *supra*, note 21.

III. *Current Litigation: The H2, H20 and H4 Tests*

All regular entry-level hiring in the SFFD between the time of the termination of the *WACO* litigation and the filing of this action was carried out pursuant to lists E-25 and E-26, under the supervision of the *WACO* court.[25] Facts paras. 18, 27, 31; *WACO V*, slip op. at 10.

The SFFD administered a new H2 entry-level test in 1982-83, and a new H20 fire lieutenant promotional test in 1984. Also in 1984, the SFFD administered an H4 fire inspector promotional test. After the results of the 1982-83 H2 test were published, the United States and plaintiff-intervenors brought separate suits in this court under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. § 6701 et seq., for the City's failure to correct the effects of past discrimination and for its continued use of invalid hiring procedures that had an adverse impact on women and minorities. The United States sought relief for Black, Asian and Hispanic applicants. The plaintiff-intervenors sued on behalf of women and Blacks and added claims for racial harassment. Subsequently, Asian and Hispanic intervenors joined the action. In addition, there were individual claims for relief. The cases were consolidated in 1986.

The consolidated complaints focused on current hiring practices, specifically on the adverse impact of the 1982-83 H2 test for entry-level firefighter, the 1984 H20 test for promotion to fire lieutenant and the 1984 H4 test for promotion to fire inspector. The plaintiff-intervenors also

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[25] In addition to the SFFD's regular hiring, there was hiring from list P-1. This list was generated for the Fireman Safety Technician Program, a temporary, special, federally funded program outside the normal Civil Service channels which was designed to prepare minority applicants to pass the H2 firefighter test. *See WACO III*, 360 F. Supp. at 735 n.4; Facts para. 19.

focused on charges of racial harassment. In February 1986 this court preliminarily enjoined the City from hiring from the E-27 list generated by the 1982-83 H2 test. *See* Order of February 12, 1986 at 15.

The 1982-83 H2 test consisted of a written exam and a physical agility test ("PAT"). The passing score on the written test was 60%. The written portion was to count 30% and the PAT was to count 70% toward ranking. After this suit was filed, the City re-weighted the test, considering the written exam only as qualifying test without ranking weight and giving the PAT 100% weight as a ranking device. Facts para. 45. The E-27 list consisted of 190 applicants in rank order. Facts para. 44. The results of the 1982-83 H2 written exam were as follows:

	Tested	Passed	Pass Rate
Total [26]	3376	2641	78%
White	1803	1688	93%
Black	681	377	55%
Hispanic	463	320	69%
Asian	393	250	64%

See Facts para. 47. The passing rate on the 1982-83 H2 written exam for Black applicants was 59%, for Hispanic applicants was 74% and for Asian applicants was 69% of the passing rate for White applicants.

Only those who passed the written test were permitted to take the PAT test. The results of the 1982-83 H2 PAT test were as follows:

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[26] The parties stipulated that 7273 people *applied* for the position of H2 firefighter in 1983, but that only 3376 actually took the 1982-83 H2 test. *Compare* Facts para. 43 *with* Facts para. 47. The discrepancy is unaccounted for. Whatever its cause, the result of the 46% attrition rate was to reduce the overall representation of minority applicants in the pool. For instance, the representation of Blacks in the applicant pool fell from 28% (2034 applicants out of a pool of 7273) to 20% (681 applicants out of a pool of 3376). *Id.*

	Tested	Passed	Pass Rate
Total [27]	2061	1286	62%
White	1332	886	67%
Black	282	173	61%
Hispanic	245	138	56%
Asian	183	89	49%
Women	79	18	23%
Men	1982	1268	64%

See Facts para. 48. Compared with White applicants, the passing rate on the 1982-83 H2 PAT for Black applicants was 91%, for Hispanic applicants was 84% and for Asian applicants was 73%. The passing rate for women was 36% of that for men.[28] Of the top 190 scorers, however, which were the applicants certified to the eligibility list, 66% (125) were White, 19% (36) were Black, 5% (9) were Hispanic, 8% (15) were Asian and none were women. Facts para. 49.

In June 1986 this court granted partial summary judgment on the claims that the 1982-83 H2 written exam adversely impacted Blacks and that the 1982-83 H2 PAT adversely impacted women. *See* Order of June 23, 1986 at 8-9.

On the eve of trial in October 1986, the City declared that it would not defend the validity of the H2, H20 and H4 tests. Later that month the Commission cancelled the H2 and H20 tests along with all eligibility lists. In early November the Commission did the same with respect to

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[27] There is a discrepancy between the total number of applicants who passed the 1982-83 H2 written exam and thus were qualified to take the PAT and the total number that took the PAT. The parties stipulate that 2641 applicants passed the written exam, but that only 2061 went on to take the PAT. *Compare* Facts para. 47 *with* Facts para. 48. No attempt was made to account for this difference. Again, the most obvious effect of the attrition was to reduce minority representation.

[28] The parties calculated incorrect figures for comparative pass rates and the court declines to adopt them. See Facts para. 48.

the H4 test. In response to the City's withdrawal of the tests and its decision to give up defending their validity, the United States and plaintiff-intervenors moved for summary judgment.

In February 1987 the court granted plaintiffs' motion for summary judgment, issued a permanent injunction and provided for interim hiring. See *United States v. City and County of San Francisco*, 656 F.Supp. 276 (N.D.Cal.1987) [hereinafter "*Davis I*"]. The court found, in light of the City's admissions, that "the H2, H4, and the H20 selection and promotion procedures fall within the definition of employment practices proscribed by Title VII. These facts clearly establish a prima facie violation of law. . . ." *Davis I*, 656 F.Supp. at 282.

Further, the court determined that the City's withdrawal of the H2, H20 and H4 tests did not bar the award of injunctive relief, "particularly . . . in light of the City's plans to immediately develop a new series of hiring and promotional examinations. Given the City's historical inability to develop valid employment procedures, the possibility of future violations must be precluded by assuring that the City's new examinations finally satisfy the requirements of Title VII." *Id.* at 287 n. 14. The court rejected the argument that by withdrawing the challenged tests, the City had "immunized itself from the future use of discriminatory hiring practices." *Id.* at 287.

> [T]he City has only deepened cause for concern by conceding that it has failed once again to develop valid employment procedures for hiring and promotions within the Fire Department, thus adding yet another chapter to an unenviable record of behavior reaching back nearly two decades. For the court to ignore the SFFD's consistent and ongoing inability to utilize nondiscriminatory employment procedures, and to decline to enter judgment and award injunc-

> tive relief to assure that this sorry history will finally come to an end, would be inexcusable.

Id. The court then issued a permanent injunction, large portions of which have been incorporated in the consent decree. *Compare Davis I.* 656 F.Supp. at 289-292 *with* Consent Decree Ex. A. The injunction, which remains in effect for five years, prohibits violations of Title VII by the SFFD or its toleration of such violations by its employees; requires the institution of recruitment and training programs; requires new test development according to the Uniform Guidelines; sets out a schedule for test development deadlines; requires semiannual progress reports to the court; and requires record keeping. *Davis I*, 656 F.Supp. at 289-92.

Finally, pending the development of a new H2 entry-level firefighter test, the court provided for provisional interim hiring to avoid a staffing emergency that might endanger the public welfare. *Id.* at 292-93.

With one exception, this court never received evidence or made any findings with respect to plaintiff-intervenors' charges of racial harassment. The City and plaintiff-intervenors, however, have stipulated that the SFFD's procedure for handling charges of racial harassment is different from that used for other rules violations. Facts para. 54. In addition, the parties stipulated that prior to October 1986 only two White firefighters had ever been suspended as a result of a complaint of racial harassment filed by a Black firefighter. Facts para. 55.

Although no evidence was ever received at a full trial regarding plaintiff-intervenors' charges of racial harassment, the court did on one occasion receive sworn testimony regarding incidents of racial harassment. In January 1988 plaintiff-intervenors moved the court to find the City in contempt of court for failing to comply with the term of the permanent injunction forbidding racial harassment. See *Davis I*, 656 F.Supp. at 289-90 (per-

manent injunctive relief para. 1). Specifically, the City was charged with failing to investigate or punish members of the SFFD for incidents of racial harassment and encouraging harassment of minorities by maintaining an attitude of tolerance toward such incidents. The catalyst for the motion was widely reported incident in which two minority firefighters (one Asian and one Black) returned to their firehouse desks to find a swastika hanging from a nearby wall.

At the court's request, the court-appointed monitor filed under seal a report on the swastika incident as well as other recently reported incidents of racial harassment.[29] Before the hearing on the contempt motion, the report was made available only to the court, counsel for the City and plaintiff-intervenors, and the Chief.

The SFFD's Chief Edward Phipps [30] testified at a hearing on the motion on January 14, 1988. In response to questioning by attorneys for plaintiff-intervenors, the City and the Union, as well as by the court, Chief Phipps explained the procedure for dealing with charges of harassment and testified that it was his duty to investigate charges of discrimination and racial harassment. The Chief admitted, however, that he was unfamiliar with both the SFFD's internal reports and the report of the monitor regarding the incidents in question. Further, the Chief said that although he had the power to suspend

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[29] These incidents included the posting of a racially inflammatory letter, which was authored by an aide to one of the deputy chiefs, on the bulletin board of a firehouse; an assault on the SFFD's chief in charge of training by some off-duty members of the SFFD for helping women train to be firefighters; and the removal of the image of the only Black firefighter in a photograph of SFFD honorees.

[30] Chief Phipps resigned his position a few days after the hearing in the matter of the swastika. In March 1988, Mayor Agnos announced the appointment of Chief Postel.

immediately, he had never done so, preferring to counsel firefighters regarding their behavior and wait for an official report. The Chief admitted that the SFFD had not committed sufficient resources to enable it to investigate quickly and punish charges of racial harassment. The Chief could not recall whether he had ever imposed discipline in response to a racial grievance. The Chief admitted he had heard reports that members of the SFFD had taken up collections and compensated firefighters suspended for disciplinary infractions. He could not say whether storing as opposed to displaying a swastika in a firehouse would warrant disciplinary action. Finally, the Chief expressed less concern about the posting of a racially inflammatory letter at one of the firehouses than about whether it was written on-duty or off-duty.

The court found that with respect to the treatment of minority members, the SFFD was "out of control." Further, the court found that the SFFD was clearly lacking either the willingness or the ability to carry out the court's injunction and the SFFD's internal order prohibiting racial harassment.[31] The court found that the delays in investigating charges of harassment suggested an atmosphere of toleration for such incidents.

The court issued an injunction which holds all members of the SFFD above the rank of lieutenant personally responsible for implementation of the SFFD's anti-harassment policy as embodied in its General Order of October 1987 and as incorporated in the court's order. *See* Order filed February 5, 1988 [hereinafter "*Davis II*"], notice of appeal filed March 7, 1988. The court ordered these persons to ensure, within ten days, that each firehouse under their supervision was inspected and that all racially or sexually inflammatory materials were removed and destroyed. *Davis II*, slip op. at 4. Failure

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[31] The SFFD had adopted an anti-discrimination order in October 1987.

to comply with provisions of the order will subject these supervisors to a finding of contempt and the imposition of a fine or imprisonment or both. *Id.* The order also provides specific time limits for processing and acting on complaints of harassment. *Id.* at 4-5. Finally, the order provides that no person disciplined by the SFFD shall be reimbursed for any resulting loss of pay. *Id.* at 5. The injunction is to remain in effect until this court orders otherwise upon determining that the SFFD has shown that it is taking responsibility for compliance with the civil rights laws as seriously as its firefighting responsibilities.

THE CONSENT DECREE

The consent decree, filed with the court on November 12, 1987, is attached as Appendix A to this order and will not be detailed here. For purposes of discussion, however, it will be helpful to outline briefly its broad provisions.

The stated purpose of the consent decree is "to eradicate the present effects of past employment practices with respect to minorities and women." Consent Decree ("C.D.") at 8.

The consent decree satisfies all claims of private plaintiffs and plaintiff-intervenors brought in this action. *Id.* at 5.

The decree incorporates, as modified by the parties, relevant portions of the injunctive relief awarded by this court in *Davis I*. C.D. at 6 and Ex. A.

The decree provides that the City shall continue to require that all applicants for the position of H2 entry-level firefighter be bona fide residents of the City and County of San Francisco at the time of and for a period of four months prior to the time of their application and through the date of their appointment. The parties

specify that the City and County of San Francisco is the relevant geographic labor market. *Id.* at 6.

The decree provides for the constitution of and specifies the powers and duties of a test development committee. *Id.* at 7.

The decree sets out long term hiring goals of 40% minority and 10% female representation. Such goals are made subject to the availability of qualified applicants. To help assure a pool more accurately reflective of female and minority representation in the community served, the consent decree provides for specific recruitment efforts. *Id.* at 8-9. Failure to meet a goal cannot be justified on the basis of an approved test unless the test comports with the Uniform Guidelines on Employee Selection Procedures and is shown to eliminate or minimize adverse impact consistent with those guidelines. *Id.* at 8.

The provisional firefighters hired pursuant to *Davis I* are to be given a special test no later than October 1, 1988. Those who pass will receive permanent appointments retroactive to their hiring date. C.D. at 9.

All hiring goals are targets. Failure to meet a goal must be justified to the court. The goals presuppose hiring of 500 new firefighters over the life of the consent decree. Of the 10% goal for women in entry-level hiring, at least 50% should be minority women, and a higher goal may be imposed should there be sufficient qualified candidates. The decree imposes a 55% goal for minorities in entry-level hiring. The minimum goal for each minority group protected by the decree will be the percentage reflected in the 1980 and 1990 census. Currently these percentages are: 19% Asian, 10% Black and 11% Hispanic. If the City decides to test less than all those who apply, the testing pool must reflect the applicant pool and be selected at random. *Id.* at 10-11.

To remedy adverse impact in promotions the decree makes several provisions. First, six named Black provi-

sional lieutenants[32] will be promoted to permanent lieutenant retroactive to March 9, 1979, with back pay. A special H30 test for promotion to captain will be given to these six by April 1, 1988. The results of this exam are to be integrated with the existing captain's list. Those who fall within the range of those already promoted will be immediately promoted. The others will remain on the list until in the regular course they are promoted or the list expires. *Id.* at 11-12.

Second, the goal for promotions is that they come to reflect minority representation in the applicant pool. The applicant pool for promotions is defined as those who both are eligible and apply. *Id.* at 12.

Third, the consent decree sets out a fairly complicated schedule for the administration of promotional tests designed to insure that there is an increasing number of minority and female applicants in the promotional pool. All eligibility lists are to expire after two years. *Id.* at 13-15. The consent decree sets up a special procedure for grieving tests and selection procedures. *Id.* at 15-16.

Finally, the consent decree provides that within 60 days of execution by all parties, the SFFD shall promote (in addition to the six provisional lieutenants earlier named) 11 Black firefighters, 8 Hispanic firefighters and 8 Asian or Filipino firefighters from the 1984 H20 list to the position of fire lieutenant. The SFFD may also promote an additional 48 lieutenants from the 1984 H20 list. Of those promoted, 25% shall be minorities. If the SFFD promotes all 48 allowed, 5 shall be Black, 5 shall be Hispanic and 2 shall be Asian or Filipino. No one found by the court to have violated federal civil rights laws shall be promoted pursuant to these provisions of the consent decree.[33] *Id.* at 16-17.

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[32] The named provisional lieutenants are: Demmons, Lee, Braden, Brooks, Rockett and Wangara.

[33] A letter from the City and its response to the objections to the Consent Decree set out more fully the procedure to be followed to

The consent decree provides for human relations training. *Id.* at 17. It also provides a specific process for grieving human relations charges. *Id.* at 18-20.

The consent decree provides for the appointment and sets out the powers and responsibilities of a monitor who will insure compliance with the decree. *Id.* at 20-21.

The decree does not dispose of claims for attorneys' fees. *Id.*

The consent decree shall be in effect for seven years. *Id.* at 22.

LEGAL STANDARD

Voluntary compliance is the preferred means of achieving the objectives of equal employment opportunity embodied in Title VII. *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 625 (9th Cir.1982), *cert. denied*, 459 U.S. 1217, 103 S.Ct. 1219, 75 L.Ed.2d 456 (1983). *See Johnson v. Transportation Agency*, 480 U.S. 616, ——, 107 S.Ct. 1442, 1457, 94 L.Ed.2d 615 (1987); *Kirkland v. New York State Dep't of Correctional Servs.*, 711 F.2d 1117, 1128 (2d Cir.1983) ("voluntary compromises of Title VII actions enjoy a presumption of validity"), *cert. denied*, 465 U.S. 1005, 104 S.Ct. 997, 79 L.Ed.2d 230 (1984). There are several reasons for the preferred status accorded amicable settlements of litigation and plans voluntarily undertaken by employers in the absence of litigation. In addition to reasons of judicial economy and the savings of the costs of litigation, voluntary action may produce more favorable results because it is less likely than a court order to engender opposition and resentment. *Kirkland*, 711 F.2d at 1128 n. 14. Further, "[t]he value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility

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insure that no one promoted under the terms of the consent decree stands in violation of federal civil rights laws. The City's letter is attached to this order as Appendix B.

sets and because the remediation of governmental discrimination is of unique importance." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 290, 106 S.Ct. 1842, 1855, 90 L.Ed.2d 260 (1986) (O'Connor, J., concurring).

With the hope that this settlement will end the need for the court's intervention and allow the SFFD to set about healing the wounds inflicted over long years of discrimination and during the course of this litigation, the court will review the terms of the consent decree not only for the fairness of its terms, but also to insure its statutory and constitutional validity. The standards for evaluating fairness and validity are discussed below.

I. *The Standard of Review for Fairness*

A class action cannot be compromised or settled without court approval. Fed.R.Civ.P. 23(e); *Officers for Justice*, 688 F.2d at 623. Thus, the first standard by which the court must evaluate the settlement reached by the parties in this case is whether the terms of the consent decree are fundamentally fair, adequate and reasonable. *See Officers for Justice*, 688 F.2d at 625. This determination should be reached by focusing primarily on the terms of the decree. *See Moore v. City of San Jose*, 615 F.2d 1265, 1271 (9th Cir.1980). In determining whether the settlement is fair, however, the court should also consider an amalgam of factors including but not limited to: the strength of the plaintiffs' case; the risk, expense, complexity and likely duration of further litigation; the extent of discovery and stage of the proceedings; the experience and views of counsel; the presence of a governmental party; and the reaction of interested parties to the settlement. *See Officers for Justice*, 688 F.2d at 625.

II. *The Standards for Constitutional and Statutory Evaluation*

In addition to evaluating the basic fairness and adequacy of the settlement, because the city is a party to the consent decree and because the decree provides for

affirmative race-conscious relief, the court must find that the settlement satisfies two legal standards. There is no longer any question that "government bodies constitutionally may adopt racial classifications as a remedy for past discrimination." *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 480, 106 S.Ct. 3019, 3052, 92 L.Ed.2d 344 (1986). However, an affirmative action plan entered into by a municipality implicates state action and so must comport with the equal protection clause of the fourteenth amendment in addition to Title VII. *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 517 n. 8, 106 S.Ct. 3063, 3073 n. 8, 92 L.Ed.2d 405 (1986). *See Johnson*, 107 S.Ct. at 1446 n. 2; *Wygant*, 476 U.S. at 272 & n. 3, 106 S.Ct. at 1846 & n. 3; *Higgins v. City of Vallejo*, 823 F.2d 351, 352 (9th Cir.1987).

For reasons that remain somewhat elusive, the standards applicable to analysis under Title VII and the equal protection clause are not coterminous.[34] *Johnson*, 107 S. Ct. at 1449 n. 6. More often than not, the substantive requirements of equal protection are more stringent than those of Title VII and therefore the case to be made for a settlement incorporating race-conscious relief is more difficult for a public than for a private employer.

Although the substantive requirements of the law may differ, the framework of analysis is the same for both equal protection and Title VII analysis. An affirmative action plan must be evaluated according to a two part

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[34] Commentators have suggested that there is little justification for the divergence between Title VII and equal protection standards. See Rutherglen & Oritz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 UCLA L. Rev. 467 (1988); Schwart, *The 1986 and 1987 Affirmative Action Cases: It's All Over But the Shouting*, 86 Mich. L. Rev. 524 (1987); *see also Johnson*, 107 S.Ct. at 1461 ("[i]n my view, the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause") (O'Connor, J., concurring).

test under either Title VII or equal protection. First, there must be adequate justification for the use of affirmative action. *See Johnson*, 107 S.Ct. at 1452; *United States v. Paradise*, 480 U.S. 149, 172, 107 S.Ct. 1053, 1067, 94 L.Ed.2d 203 (1987); *Wygant*, 476 U.S. at 274, 106 S.Ct. at 1847; *Sheet Metal Workers*, 106 S.Ct. at 3050; *United Steelworkers v. Weber*, 443 U.S. 193, 208, 99 S.Ct. 2721, 2729, 61 L.Ed.2d 480 (1979). Second, if the plan is justified, the court must then determine that it does not unnecessarily burden the rights of non-minority employees. *Johnson*, 107 S.Ct. at 1452; *Paradise*, 107 S.Ct. at 1067; *Wygant*, 476 U.S. at 274, 106 S. Ct. at 1847; *Sheet Metal Workers*, 106 S.Ct. at 3050; *Weber*, 443 U.S. at 208, 99 S.Ct. at 2729. *See also Higgins*, 823 F.2d at 356-57, 358.

A. Justification Analysis

The Supreme Court has not agreed to the standard to be applied to affirmative action plans under the equal protection clause. *Paradise*, 107 S.Ct. at 1064 & n. 17. Courts have therefore exercised caution by applying strict scrutiny, that is, by requiring the plan to be "narrowly tailored" to serve a "compelling governmental purpose." *Id.* at 1064; *see Higgins*, 823 F.2d at 358.

The compelling governmental purpose language is not useful in the context of evaluating an affirmative action plan because that purpose is always the same. The purpose of the plan is *always* to remedy past or present discrimination. For a governmental entity this is always a compelling purpose. *Paradise*, 107 S.Ct. at 1065. The real issue to be resolved is the adequacy of the evidence of discrimination used to justfy the plan.

Equal protection requires evidence of past discrimination by the particular employer at issue in order to justify affirmative race-conscious relief. *See Sheet Metal Workers*, 106 S.Ct. at 3050. A plurality of the Court in *Wygant* stated that the Court has required "some show-

ing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." 476 U.S. at 274, 106 S.Ct. at 1847.

In *Paradise* and *Sheet Metal Workers*, the Court seemed to require more, holding that a finding of egregious, persistent and systematic past discrimination, specifically persistent and systematic discrimination was sufficient to justify court-ordered affirmative action. *Paradise*, 107 S.Ct. at 1065; *Sheet Metal Workers*, 106 S.Ct. at 3050 (race-conscious relief also may be justified "to dissipate the lingering effects of pervasive discrimination"). In both cases, without specifying what showing was required as a minimum, the Court held that a finding amounting to intentional past discrimination justified the district court's award of an affirmative race-conscious remedy.

There is a distinction drawn, however, between the evidence of past discrimination needed to justify court-ordered relief and that required for voluntary action by a public employer. In *Wygant*, a plurality of the Court would have required less than evidence of intentional discrimination to justify a public employer's voluntarily adopted affirmative action plan. Specifically, Justice Powell joined by three other Justices would have required only a "strong basis in evidence," for a finding of past discrimination sufficient to justify a public employer's voluntarily undertaken plan. *Wygant*, 476 U.S. at 277, 106 S.Ct. at 1848.

In her concurrence, Justice O'Connor expanded on the "strong basis in evidence" or, as she calls it, the "firm basis" standard. *See id.* at 286, 106 S.Ct. at 1853 (O'Connor, J., concurring). She wrote that "a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan." *Id.* at 289, 106 S.Ct. at 1854.

Her policy concern was that if public employers were compelled to demonstrate their own history of illegal discrimination in order to justify the adoption of voluntary affirmative action programs, they would necessarily be discouraged from voluntarily complying with their civil rights obligations. *See id.* at 290, 106 S.Ct. at 1855. Justice O'Connor suggested that statistical evidence of disparity sufficient to support a prima facie case under Title VII would justify (that is, constitute a "firm basis" for believing remedial action was required) voluntary affirmative action consistent with the Constitution. *See id* at 292, 106 S.Ct. at 1856. *See also Johnson*, 107 S.Ct. at 1461 (O'Connor, J., concurring). A majority of the Court is agreed that a gross statistical disparity alone may satisfy the prima facie standard. *See Hazelwood School District v. United States*, 433 U.S. 299, 307-08, 97 S.Ct. 2736, 2741-42, 53 L.Ed.2d 768 (1977). See also *Johnson*, 107 S.Ct. at 1453 n. 11 (opinion of Brennan joined by Marshall, Blackmun, Powell and Stevens, JJ.) and at 1461 (O'Connor, J., concurring).

Statistical disparities, however, provide a reliable indicator of past discrimination by a particular employer only in cases where past societal discrimination is not a factor that needs to be screened out. The only cases where societal or industry-wide discrimination need not be screened out are those in which the remedy sought to be justified affects entry-level or non-skilled hiring, or where the remedy relates to promotions but the applicant pool is wholly internal. For entry-level or nonskilled positions, the probative statistical comparison is between the percentage of minorities in the employer's work force and the percentage of minorities in the relevant labor market. *See Hazelwood*, 433 U.S. at 308 n. 13, 97 S.Ct. at 2742 n. 13. Where, as in the SFFD, promotions are made entirely from the lower ranks and there is therefore no outside labor pool, the probative statistical comparison is between the percentage of minorities in each of the upper ranks and the percentage of minorities in the qualifying

rank below. Because all hiring is entry-level and non-skilled there is no need to screen for the effects of societal discrimination (in access to training and skills) that may not be used to justify the adoption by or imposition on a public employer of affirmative race-conscious relief.

When societal or industrywide discrimination has been a factor in constraining the employment advancement of minorities, it will be impossible to establish a prima facie case by statistical comparison alone. This is because in order to screen out the effects of general discrimination (as opposed to discrimination for which the employer is directly responsible), the probative statistical comparison is between the percentage of minorities in the employer's skilled work force and the percentage of minorities in the relevant labor force *who possess the required skills*. *See Hazelwood*, 433 U.S. at 308 & n. 13, 97 S.Ct. at 2742, & n. 13. Where minorities have historically been denied access to training, see, e.g., *Weber*, 443 U.S. at 198 n. 1, 99 S.Ct. at 2725 n. 1, this statistical comparison generally will not reflect a disparity. *See Johnson*, 107 S.Ct. at 1452 n. 10.

Where generalized societal discrimination has prevented minorities from acquiring the skills necessary to become part of the qualified labor force, the statistical comparison is too crude to establish a prima facie case.[35] Ironically, the lack of imbalance between the percentage of minorities in the employer's work force and the percent-

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[35] The statistical comparison is too crude except in those cases where the agency has never in its history hired from a particular minority group. Justice O'Connor draws on this phenomenon, first identified in *Teamsters* as "the inexorable zero." *Johnson*, 107 S.Ct. at 1465 (O'Connor, J., concurring) (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23, 97 S.Ct. 1843, 1858 n.23, 52 L.Ed.2d 396 (1977). Given that minorities almost always constitute at least some meager but positive percentage of the qualified labor force, where the agency has *never* hired from among that minority, the statistical disparity is "sufficient for a prima facie Title VII case." *Id.*

age in the qualified labor force prevents public employers "in precisely those [areas] in which discrimination has been most effective" from voluntarily adopting affirmative race-conscious remedies for employment discrimination. *Id.* In order to justify such action consistent with the Constitution, a public employer would need to come up with non-statistical evidence of past discrimination, *see id.* at 1453 n. 11, and that could only be evidence of *intentional discrimination. See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 & n. 20, 97 S.Ct. 1843, 1857 & n. 20, 52 L.Ed.2d 396 (1977). It is reasonable to predict that in these circumstances, public employers will be significantly deterred from voluntarily complying with their obligations under the civil rights laws, because to do so would expose them to liability for past discrimination.

By contrast, the statutory standard under Title VII does not require evidence of past discrimination by a specific employer to justify that employer's voluntary adoption of an affirmative action plan. *See Johnson*, 107 S.Ct. at 1452-53. Last term in *Johnson*, the Court took its earlier ruling in *Weber* respecting private employers and extended it to public employers. The Court held that voluntarily adopted race-conscious remedies for past discrimination could be justified by public agencies under Title VII by showing only the existence of a "manifest imbalance" reflecting underrepresentation of minorities or women in "traditionally segregated job categories." *Johnson*, 107 S.Ct. at 1452 (quoting *Weber*, 443 U.S. at 197, 99 S.Ct. at 2724).

With respect to training programs or to jobs that demand no special skills, a manifest imbalance can be established by comparing "the percentage of minorities or women in the employer's workforce with the percentage in the area labor market or general population." *Id.* With respect to jobs demanding special skills or training, however, "the comparison [of the percentage of minorities

or women in the employer's skilled work force] should be with those in the labor force who possess the relevant qualifications." *Id.*[36]

Clearly, if there is sufficient evidence to justify the consent decree in this action under the constitutional standard, it will also pass muster under Title VII's statutory standard. Accordingly, the court will apply only the constitutional "firm basis" standard to determine whether the terms of the decree are justified.[37]

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[36] The *Johnson* majority found that it was necessary to identify the skilled labor force as the relevant labor market for purposes of comparison (rather than the general labor force) in order to avoid blindly *hiring* unqualified minorities and women in numbers sufficient to eliminate the statistical disparity. 107 S.Ct. at 1454. This, of course, makes no sense. The way to avoid forcing the hiring of unqualified personnel is to forbid blind hiring. The way, however, to encourage public employers voluntarily to adopt affirmative action plans consistent with Title VII is to allow them to justify such action by demonstrating a manifest imbalance between minority representation in all job categories and minority representation in the general area labor force. The *Johnson* majority managed only to make the prima facie and manifest imbalance standards more alike.

[37] A threshold issue is whether a consent decree falls into the category of purely voluntary plans or the category of court-ordered relief. Because a consent decree is an agreement freely negotiated by the parties, it is voluntary; but because it requires court approval, it is in some sense court-ordered relief. The Supreme Court has observed that consent decrees are not treated the same for all purposes and that the proper inquiry is whether, "given their hybrid nature, consent decrees implicate the concerns embodied in [the relevant substantive law provision] in such a way as to require treating them as 'orders' within the meaning of that provision." *Firefighters v. City of Cleveland*, 106 S.Ct. at 3074.

Applying this analysis, this court finds that the concerns embodied in the equal protection clause do not require that a consent decree be treated as an order. The Court has already ruled in the context of Title VII that a consent decree falls into the category of voluntary plans. *Id.* at 3075. This holding was based on the observation that one of the legislative concerns in enacting Title VII was to avoid government interference with management de-

B. Burdens Analysis

Several factors are relevant in determining whether the justifiable remedy is nontheless too burdensome to innocent nonminorities. These factors are the same under the "narrowly tailored" inquiry of equal protection analysis as they are under Title VII because the inquiries are conceptually identical.

The factors to be considered in evaluating the permissible burden of justified affirmative relief include: whether the plan unnecessarily trammels the rights of non-minorities; whether the plan acts as an absolute bar to non-minorities; whether the plan requires "blind hiring"

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cisions. *See id.* at 3074-75 & n. 10 (there is "no indication that Congress intended to leave governmental employers with less latitude under Title VII than had been left to employers in the private sector."). In the context of equal protection, which contains no direct proscription of certain types of court ordered relief, there is no reason to treat the consent decree as an order rather than a voluntary agreement. "[T]he voluntary nature of a consent decree is its most fundamental characteristic." *Id.* at 3075. There is nothing in the language or spirit of the fourteenth amendment that would require the relief embodied in a Title VII consent decree to be construed as an order.

Further, while the Court has not yet directly addressed this question, there is some indication that in the constitutional context a consent decree should be evaluated according to the same criteria as purely voluntary plans. *See, e.g., Johnson*, 107 S.Ct. at 1451 & n. 8; *Firefighters v. City of Cleveland*, 106 S.Ct. at 3073 & n. 8. The court sees no reason to treat a consent decree as other than a voluntary settlement device.

Nor is there any reason to distinguish based on when in the litigation a consent decree is reached. The question is voluntariness vis-a-vis a court order. For the court to measure the degree of voluntariness based on the pressures or stage of litigation would result in needless ancillary proceedings. Such a determination is not required by the case law. In fact, the Supreme Court has suggested otherwise. *See Firefighters v. City of Cleveland*, 106 S.Ct. at 3073-77. Accordingly, the court will evaluate the consent decree as a voluntary plan under both equal protection and Title VII analysis.

of minority applicants without regard to qualifications; whether the plan uproots legitimate expectations of non-minorities; whether the plan requires rigid quotas or flexible goals; and whether the plan is temporary or designed to maintain a balanced work force.[38] *See, e.g., Johnson*, 107 S.Ct. at 1454-56; *Paradise*, 107 S.Ct. at 1067; *Higgins*, 823 F.2d at 357. The court will consider these factors in evaluating the terms of the consent decree.

DISCUSSION

The settlement of this case was hard fought and hard won. San Francisco has long prided itself on its reputation for celebrating rather than discriminating on the basis of human diversity. No party more than the City wants the SFFD to end this lengthy, divisive litigation and get on with the business of serving the San Francisco community.[39]

I. *Review for Fairness*

The first question to be addressed by the court is whether the settlement reached is fair, adequate and reasonable. *See Officers for Justice*, 688 F.2d at 625. For the City, the risks of continuing with this litigation were many, and plaintiff-intervenors' case was strong. The City repeatedly has been admonished by courts and repeatedly has failed to produce entry-level and promotional employee selection procedures that are valid under Title VII. As a result, the SFFD has required court super-

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[38] Certain remedies, most notably layoffs, are apt to be found unduly burdensome in most circumstances. *See Wygant*, 476 U.S. at 282-84, 106 S.Ct. at 1851-52.

[39] The City has repeatedly recognized in hearings and settlement discussions that an integrated fire department is not only legally required but is better equipped to serve the citizenry than a men's club closed to all but the White sons of present and former San Francisco firefighters.

vision in order to hire and promote uniformed firefighters for close to the last twenty years. This court has already entered partial summary judgment against the City on the liability issues. *See Davis I*, 656 F.Supp. at 288.

Further, the court recently found that the SFFD is either unwilling or unable to enforce the provisions of the civil rights laws. See *supra*, p. 1298. In addition, the City had substantial indication from the reports of the monitor that there was a good case to be made against the SFFD for racial harassment. Indeed, at the fairness hearing, the City revealed that its primary motive in negotiating and agreeing to the consent decree was to avoid the risk that the court would make a finding of intentional discrimination after trial and award relief more onerous than that imposed by the terms of the decree. Finally, although discovery was virtually complete, not only would a trial on the harassment issues have been long, complex and costly, but whatever the result, general publication of the evidence at trial, which this court previewed at various pretrial proceedings, would almost certainly have been extremely embarrassing and demoralizing to the SFFD.

The objections of the United States [40] and the Union are addressed specifically to the standards mandated under Title VII and the Constitution and will be discussed below. The objections filed by individual firefighters and members of the public, however, do go to the general issue of the fairness of the consent decree and so it is appropriate to consider them at this junction.

One hundred thirteen persons took the time and effort to file written objections with the court. The great majority filed on forms provided by the Union. Many of those who filed objections had given the competing interests considered thought and some offered alternative proposals. Some, however, do not understand that the funda-

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[40] See *supra*, note 3.

mental premise of compromise is that no party gets everything it wanted; each has to give something up. Others fail to understand that it is both fair and reasonable to require those who have been the passive beneficiaries of past discrimination to bear some of the burden in remedying the harm caused to others.

The court cannot here answer each objection. However, the objections fall into certain broad categories that will be addresssed. Almost all the objections concerned the changes in promotional practices, as opposed to hiring practices, made in the decree.[41] Many objected that those minorities promoted to H20 fire lieutenant pursuant to the decree did not qualify on the merits by passing a test. This argument, of course, fails to account for the fact that the City has conceded that the H20 tests previously used have not been shown to be job-related. Thus, those who passed the test are not demonstrably more qualified to perform the job of fire lieutenant than those who failed. A related objection is that departmental morale will be adversely affected by the promotion of unqualified personnel. The court hastens to assure and to remind the members of the SFFD that the decree specifically provides that no one who is not qualified shall be hired or promoted according to its terms.

Others object to the loss of educational credits which will no longer be taken into account in promotions. These credits, however, have not been shown to be job-related. Similarly, some firefighters objected to the failure of the affirmative remedies to take seniority into account: two men objected to consideration of intra-minority seniority. However, to take seniority into account, in view of the SFFD's persistent discrimination in hiring, would only

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[41] Significantly, there were almost no objections to the terms of the decree that provide affirmative action for women. This may be attributable to the fact that the consent decree does not provide for the immediate promotion of any women, but only sets up future hiring goals.

serve to confirm rather than to remedy past discrimination. Some claimed the SFFD has already done its best; others objected that the City had caved in and should have done more to defend the tests. These assertions are belied by irrefutable evidence of a series of exams having an adverse impact on women and minorities. Still others complained that the testing schedule was unrealistic. This may already have proven too true. However, it is not grounds for invalidating the decree.

The terms of the consent decree are fair. The firefighters hired pursuant to the provisional hiring order in *Davis I*, 656 F.Supp. at 292-93, will be given permanent status retroactive to their hiring dates if they pass a special test to be given no later than October 1 of this year. This test will be additional insurance of their qualifications for the job, although their tenure alone strongly suggests they are qualified.

The promotional remedies are likewise fair. To remedy the adverse impact of the 1978 H20 fire lieutenant's exam, the next six Black firefighters from the 1978 list will be promoted with back pay retroactive to March 9, 1979. They will also be afforded the opportunity to take a special H30 test for the rank of captain in an effort to put them in the same position for promotion they would have been in had they been appointed lieutenants in 1979. In addition to these six men, the decree calls for the promotion of 27 minority firefighters from the invalid 1984 H20 fire lieutenant list and of up to 48 more lieutenants of which 25% shall be minority firefighters. This will act to stem the shortage of lieutenants and to get qualified minority firefighters quickly into the upper ranks after twenty years of virtual exclusion. It will also be an opportunity for promotion for a number of firefighters, many of whom will be White, who have long waited for promotion. As the City pointed out at the fairness hearing, these promotions will not be blind. Race will be only one consideration among others, including each candidate's work history and performance evalua-

tions. The 1984 list is to be used only to create a non-arbitrary tentative list of candidates. To the extent that the provisions of paragraph 16 of the consent decree conflict with the City's representations that work qualification factors other than rank on the 1984 list and race will be considered in making these promotions, the City's representations prevail and the consent decree is deemed amended.

Further, the actual numbers of race-conscious appointments are modest. A representative of the California FEHC who appeared at the fairness hearing said that while the FEHC had agreed to accept the terms of the consent decree in lieu of the relief it had awarded in 1982, if the numbers of minority appointments were reduced then the FEHC would reconsider its decision to take no further action against the City. She explained that the numbers set out in the decree were already substantially lower than what the FEHC would have required.

Finally, it is eminently fair that those firefighters who stand in violation of Title VII should be expressly prevented from benefitting from the terms of the decree. While such firefighters, should they remain with the SFFD, will be eligible for promotion through the regular process of testing, it would be patently unjust to allow those who had violated the civil rights laws to benefit from a decree that is intended to redress those violations.

The hiring and promotional [42] goals set by the parties are modest in view of the demography of the City. Although the goals have some teeth, they are flexible. Most importantly, they are expressly subject to the availability of qualified applicants.

As important as it is that the plan is fair, it is just as important that it is comprehensive, flexible and de-

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[42] The promotional goals are necessarily dependent on the success of minority entry-level hiring because the promotional process is entirely internal. See *supra*, note 16.

signed in a continuing spirit of cooperation between the parties. It therefore has a good chance of achieving some immediate and measurable success in wiping out the present effects of past discrimination. The plan is comprehensive in that it creates a whole system that deals with issues including test development, recruitment, the timing of the administration of tests and the duration of promotional lists, grievance procedures for complaints regarding both testing procedures and racial harassment, human relations training, issuance of appropriate equipment to all firefighters and provision for a court-appointed monitor who will supervise the implementation of the decree. The parties have agreed to cooperate on test development and to create procedures for resolving disputes that may arise in the event of changed circumstances.

Most importantly, the hiring goals of this decree, while flexible, are meaningful. Failure to achieve the goals must be justified to the court and cannot be explained away unless the test in question both comports with the Uniform Guidelines and eliminates or minimizes adverse impact. The requirement that the City justify a failure to meet a hiring goal does not make the goal a rigid quota. This provision is essential in light of the City's history of producing facially neutral exams with a significant adverse impact on minorities and women and the failure of the City to achieve the goals it negotiated for itself in the *WACO* consent decree. Indeed, the decree would be wholly inadequate and destined to fail in the absence of a provision requiring the City to justify its failure to attain the modest goals outlined in the decree.

Accordingly, the court finds the consent decree to be fair, adequate and reasonable.

II. *Statutory and Constitutional Review*

The terms of the consent decree are narrowly tailored to achieve a compelling governmental purpose. *See Higgins*, 823 F.2d at 358. The compelling purpose is to

remedy the City's pattern and practice of discrimination in hiring and promotion on the basis of race and sex. The decree not only seeks to stop present discrimination but provides the means to eradicate the present effects of past discrimination. These purposes are entirely consistent with both Title VII and equal protection. *See Johnson*, 107 S.Ct. at 1452; *Paradise*, 107 S.Ct. at 1065.

The remedies provided for in the consent decree are necessary and justified by a firm basis in evidence. The Ctiy has proven itself unable to arrive at employee selection procedures which do not have an adverse impact on minorities and women. Plaintiff-intervenors have shown statistical disparities sufficient to establish a prima facie case of discrimination in both hiring and promotion under Title VII and the City has admitted that the tests used were not demonstrably job-related. *See Davis I*, 656 F.Supp. at 282. Affirmative remedies are required because the City has proved unresponsive to its duties under Title VII and the injunction of this court to come up with valid employee selection procedures. Affirmative race-conscious relief is the only effective means to assure the enjoyment of equal employment opportunity and to prevent further delays by the City. *See Paradise*, 107 S.Ct. at 1067; *Sheet Metal Workers*, 106 S.Ct. at 3036-37.

The Union points out that as of last February the court did not believe there to be sufficient evidence in the record to order race-conscious affirmative relief, *see Davis I*, 656 F.Supp. at 288-89, and that little has been added to the record since then. Although there may not have been sufficient evidence to justify *court-ordered* affirmative relief at that time, there was sufficient evidence to justify the *voluntary* adoption of an affirmative action plan. Further, significant evidence regarding racial harassment was added to the record only after the entry of permanent injunctive relief.

The Union raises the City's "good faith" efforts as if good faith were a bar to this court's approval of the

settlement. Additional relief is unnecessary, claims the Union, because the injunctive relief awarded in *Davis I* in combination with the City's good faith efforts to reduce the adverse impact of its hiring and promotional tests are sufficient relief. The Union, however, cites no authority for the proposition that an employer's good faith is an adequate substitute for concrete remedial action. Of course, it is not. Further, while there is no finding that the City intentionally discriminated in hiring and promotion in the SFFD, there is no evidence to support a finding of good faith. To the contrary, the City has repeatedly failed to come up with valid employee selection procedures despite court orders, an earlier consent decree and a series of promises. While over recent months the City has conducted negotiations in this case in apparent good faith, this represents a marked change from twenty years of indifference and failure to produce valid tests. In light of this history the court cannot rely merely on current protestations by the Union on behalf of the City's good faith.

Finally, the Union contends that the relief in the consent decree is not warranted because its statistical comparisons are based on the wrong relevant work force. Residence in the City has always been a prerequisite for employment in the SFFD and the residency requirement is included in the consent decree. Yet the Union now contends that the relevant work force for purposes of comparison is the Standard Consolidated Statistical Area ("SCSA"). The SCSA includes the nine counties surrounding San Francisco as well as the City. It is contended that when the representation of minorities in the SFFD is compared with their representation in the SCSA, there will be almost no statistical disparity. The Union, however, does not explain why the SCSA work force suddenly, after years of an in-City residence requirement for initial employment in the SFFD, is inherently more relevant for purposes of comparison than the City and

County of San Francisco work force; the Union only argues that the SCSA is more White.

In support of its argument for the use of the SCSA, the Union cites only one case, *Hammon v. Barry*, 826 F.2d 73 (D.C.Cir.1987), decided in the wake of the Supreme Court's ~~most~~ recent affirmative action decisions. In that case the court found that the relevant labor force was the greater Washington metropolitan area rather than only the city of Washington, D.C. *Id.* at 77.

First, the D.C. Circuit's ruling in *Hammon* is inapplicable to this case. In the case of the District of Columbia fire department, there never had been an in-city residence requirement. The reason the court identified the metropolitan area as the relevant work force was that "it is undisputed that approximately half of the District's entry-level firefighters have hailed from the suburbs." *Id.* By contrast, the SFFD has always maintained an in-city residence requirement for entry-level hiring. The Union has provided the court with no good reason to disregard that fact at this juncture. Further, in *Officers for Justice v. San Francisco Civil Service Commission*, a parallel Title VII suit against the City's Police Department, a similar in-city residence requirement was approved. *See* 473 F.Supp. 801, 808, 812 para. 5 (N.D.Cal.1979), *aff'd*, 688 F.2d 615 (9th Cir.1982), *cert. denied*, 459 U.S. 1217, 103 S.Ct. 1219, 75 L.Ed.2d 456 (1983).

Second, the court agrees with Judge Mikva who, dissenting from the opinion of the court in *Hammon*, wrote that "[b]y cavalierly asserting that the Washington metropolitan area is the relevant labor market and then concluding that minorities are *over* represented in the Fire Department, the majority adds gratuitous insult to grievous injury." 826 F.2d at 91 (Mikva, J., dissenting). Judge Mikva pointed out that since the employees of the District of Columbia government, excluding the fire de-

partment, reflected the representation of minorities within the city, there was no reason to find that the metropolitan area provided a more appropriate comparison for purposes of measuring adverse impact. *Id.*

Moreover, in view of the Union's historical opposition to the City's effort to comply voluntarily with its duty under the civil rights laws, there is something patently offensive in the Union's argument that after many years of observing a city residence requirement the SFFD should suddenly be held to the standard of the representation of minorities in the wealthy and largely White outlying counties of San Francisco such as Marin. The SFFD serves not Marin County but the citizens of San Francisco, who are more diverse in race and national origin and have a right to demand that their diversity be reflected rather than denigrated in the SFFD. Also offensive is the Union's argument that the lieutenant promotions are not necessary because the SFFD has operated effectively without permanent appointments for many years. The Union would like this court to ignore its frequent complaints about the delays in promotions and the damage this has wreaked upon the SFFD and the members of the Union—complaints consistently reiterated at every court hearing until the consent decree was offered.

Having found that the remedies provided in the consent decree are justified, the court also concludes that the remedies are narrowly tailored to accomplish the purpose of eradicating the past and present effects of the City's discrimination. Using the most stringent test as presented in *Paradise*, the court will consider whether the terms of the decree are sufficiently flexible, 107 S.Ct. at 1070; whether the decree is temporary, *id.* at 1071; the relationship between the numerical relief and the percentage of minorities in the relevant work force, *id.*; and whether the relief provided places an unacceptable burden on innocent third parties, *id.* at 1073.

The hiring goals and specific minority hiring requirements set out in the decree are highly flexible. First, the decree specifically provides that no provision—including the specific hiring provisions—shall be construed as a quota, nor shall any term of the decree be interpreted to require the hiring of any person not qualified for the job. This will operate as a waiver in the highly unlikely event that there are no minority firefighters qualified for the rank of lieutenant. Further, the City has stated on the record that in hiring from the 1984 H20 list pursuant to the terms of the decree, race and test score will not be the only factors. Past performance and work history will also be considered in making the promotion decision. Again, to the extent the City's representations in this regard are in conflict with the consent decree at paragraph 16, the City's representations prevail and the consent decree is deemed amended. In addition to rank on the 1984 list and race, past performance on the job and work history shall also be considered in making these promotion decisions.

Second, there are numerous provisions for adjustment of the requirements of the decree should the parties' predictions regarding future hiring be rendered inaccurate by lack of need, budget cuts and the like. *See Paradise*, 107 S.Ct. at 1070. In order that flexibility not be so great as to make the plan meaningless, however, the parties must justify any changes to the court. The court has already permitted the adjustment of deadlines for test development.

As to the temporary duration of the affirmative action plan, seven years is reasonable and necessary in view of the staggered testing schedule which is the heart of the decree. It is the careful arrangement and adjustment of the schedule of promotional tests that will allow the regular advancement of qualified minorities and women into the supervisory ranks of the SFFD and thus eliminate the vestiges of past discrimination.

Next, as discussed above, the numerical relief is closely related to the relevant labor force. The court has already rejected the Union's argument that the SCSA rather than the City and County of San Francisco is the relevant labor market. The Union must concede that the hiring and promotional goals set in the decree are modest with respect to the representation of minorities and women in the City. Had there been a finding of racial harassment after trial, this court might have constitutionally ordered one-for-one hiring as a remedy. *See Paradise*, 107 S.Ct. at 1070-71. In view of the facts that the City admittedly feared the imposition of such relief and that the FEHC stated on the record that it would consider taking further action against the City if the terms of the decree were altered to promote fewer minorities, the numerical relief afforded by the decree is indeed modest as well as closely related to the relevant labor market.

The decree requires the promotion of only 33 minority firefighters to the rank of lieutenant. Should the SFFD need to promote an additional 48 from the 1984 H2 list, then 25% of those appointments must be from among minority firefighters. These numbers are not out of line with the representation of minorities in the firefighter's rank, which is the relevant work force for comparing representation at the next highest rank. See discussion *supra*, pp. 1302-03. The City has indicated that these numbers were arrived at through negotiation. Further, the numerical relief is less extensive than what the court might have ordered after a finding of racial harassment.

Finally, the terms of the decree do not unnecessarily trammel the rights or uproot the legitimate expectations of nonminority or male employees and therefore do not impose an unacceptable burden. The decree imposes no layoffs, *see Wygart*, 476 U.S. at 282-84, 106 S.Ct. at 1851-52, nor does it impose an absolute bar to the advancement of White males, *see Sheet Metal Workers*, 106

S.Ct. at 3052. Not even the promotion of 33 minority firefighters to the rank of lieutenant imposes an unacceptable burden because the decree also permits the promotion of a large number of White firefighters to lieutenant.

In yet another burst of novel legal argument, the Union contends that the decree unnecessarily trammels the rights of White employees because it does not *require* the City to promote White firefighters. The City cannot, however, be required by consent or by this court to promote White firefighters because there has been no showing of discrimination against that group; it can only be required to be fair in choosing among qualified applicants. *See Paradise*, 107 S.Ct. at 1073. The Union also argues that the decree does not require the 33 minority firefighters to be promoted to lieutenant to be qualified. This contention is patently false for the reasons stated above.

Further, the Union argues that the numerical hiring provision is not tailored narrowly enough because the minority firefighters to be promoted from the 1984 H2 list were not harmed by that list as it was never used. The City has explained, however, that the promotions from the 1984 list are the result of compromise in negotiating the settlement and are not a remedy for any harm caused by the 1984 test. The 1984 list is being used only as a better than arbitrary means of generating a list of firefighters eligible for promotion. Work performance and past record will also be considered in making promotion decisions. See *supra*, pp. 1309-10.

The hiring and promotional goals only make race one "plus" factor among many in employment decision making. *See Johnson*, 107 S.Ct. at 1457. All candidates must be qualified; the decree does not mandate, nor does it permit, blind hiring. Finally, the goals are temporary and flexible. The effect of the decree will be to help

achieve rather than to maintain, a racially and sexually balanced work force.

The City has resolved the United States' objection that the consent decree restricts its rights under the terms of the permanent injunction to consult on the development of future hiring and promotional tests by stating in the record that it will accord the United States all rights set out in *Davis I*. There is nothing in the consent decree that contradicts or restricts those rights. The consent decree settles the dispute between plaintiff-intervenors and the City. It does not purport to affect the rights of the United States.

Considering the long history and extensive facts demonstrating past discrimination, the relief afforded here is well within the parameters of the relief allowed in *Paradise*, *Firefighters v. City of Cleveland*, and *Sheet Metal Workers*. All the criteria of *Weber*, *Wygart* and their progeny have been satisfied. The terms of the consent decree are narrowly tailored to serve a compelling governmental purpose.

CONCLUSION

Based on the record before the court, having considered the arguments of the parties and alternative proposals, for the foregoing reasons, the court finds that the consent decree, as amended, is fair, adequate and reasonable, and narrowly tailored to serve a compelling governmental purpose. Accordingly, the consent decree is approved.

IT IS SO ORDERED.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

CONSENT DECREE

Filed May 20, 1988

PRELIMINARY STATEMENT

These are employment discrimination actions against the San Francisco Fire Department ("SFFD") brought by the United States and several individual and organizational plaintiffs and plaintiff-intervenors and joined as defendant-intervenor by San Francisco Firefighters Local 798. Plaintiffs allege that the City's administration of certain employment examinations for entry level hiring and promotional decisions unlawfully discriminated against women and minority group members in violation of Title VII of the Civil Rights Act of 1964, as amended in 1972, the Civil Rights Acts of 1866 and 1871, and the non-discrimination provisions of the State and Local Fiscal Assistance Act. Plaintiffs in intervention also allege that the SFFD has maintained, perpetuated, and failed to correct an atmosphere of racial hostility directed against minority firefighters.

The plaintiffs have, during the course of this litigation, introduced substantial evidence of discrimination by the SFFD. This Court has issued preliminary orders finding the defendants' selection practices and procedures for entry level and promotional positions to be discriminatory and in violation of federal law. In particular, on June 23, 1986, the Court found that the 1982 H-2 entry level examination adversely impacted women and minorities. Subsequently, the City conceded that the 1984 H-20

fire lieutenant promotional examination resulted in an adverse impact on certain minority groups. In addition, the Court of Appeal of the State of California has found that the California Fair Employment and Housing Commission correctly concluded that the 1978 H-20 fire lieutenant promotional exam discriminated against black firefighters and that it had an adverse impact on them and was not proven to be job related. *City and County of San Francisco v. Fair Employment and Housing Commission* (1987) 191 Cal.App.3d 976 [236 Cal.Rptr. 716].

In its order of February 26, 1987, this Court reviewed the history of this litigation and concluded that the City's selection and promotional practices for the positions of entry level firefighters, fire inspector, and fire lieutenant violated Title VII. Based upon that finding the Court granted declaratory and injunctive relief.

A further factual basis justifying the imposition of the foregoing relief is contained in the Statement of Undisputed Facts filed concurrently with this Decree.

The parties signatory to this Decree wish to avoid the delay and expense of continued litigation and desire to insure that any disadvantage to minorities and females that may have resulted from past employment practices be remedied so that equal employment opportunity will be provided to all.

The Court has jurisdiction over the parties and subject matter of this action.

The signatories, by agreeing to the issuance of this Decree, waive the hearing and findings of fact and conclusions of law on all issues raised by the complaints, and the parties have mutually agreed to the entry of the Consent Decree. Defendants, by entering into this Consent Decree, do not thereby admit any violations of law, rule or regulation with respect to the allegations made by plaintiffs, private or governmental, in their complaints. By entering into this Consent Decree, defendants do not

concede the validity of the Court's finding of unlawful discrimination.

The Court having been fully advised and informed of the facts and circumstances, and good cause appearing therefore,

NOW, THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

I. EFFECT OF THE CONSENT DECREE

This Decree is entered into as a settlement of the remaining existing disputes between the private plaintiffs and plaintiff-intervenors and defendants as to appropriate and valid procedures for the hiring and promotion of firefighters for the City and County of San Francisco. It also provides for specific, definable and good faith efforts to be made by defendants to achieve certain goals for employment of women and minorities as herein defined, within specified periods of time. This Consent Decree satisfies and resolves all claims of the private plaintiffs and the classes they represent, of racial, ethnic, national origin, and sex discrimination with respect to those matters set forth in the complaints and the previous orders of this Court.

Both private plaintiffs and the classes they represent shall seek no further relief for the acts, practices or omissions alleged in the complaints save to enforce the provisions of this Decree, thereby waiving the right to seek further relief.

Private plaintiffs and plaintiff-intervenors agree that this Consent Decree is fully binding individually and on the classes they represent. Defendants agree that this Consent Decree is fully binding on each of them, each of their officers, agents, employees and successors, and all other persons acting in concert with them who have notice of this Decree.

II. GENERAL

1. The permanent injunctive relief set forth at pages 31-38, Paragraphs 1-3, 5-6, 8-9, 12-14, of the Court's order of February 26, 1987, as modified by agreement of the parties, attached hereto as Exhibit "A" and incorporated herein as though fully set forth, shall remain in effect for seven years from the date of the entry of the order approving this Decree.

2. In the event the entry of this Consent Decree generates, either through intervention or separate lawsuits, attacks on the lawfulness of any of the provisions contained herein, the parties hereto agree and warrant that they shall defend said provision or provisions against such attacks. If any such lawsuit is brought in state court against the defendants, defendants shall seek to remove such action to the Federal District Court and the signatories shall support said action.

3. The defendants have required in the past, and shall continue to require, that applicants for the rank of H-2 firefighter be *bona fide* residents of the City and County of San Francisco at the time of and for a period of four months prior to the time of their application and through the date of appointment, with residence after appointment to be maintained as permitted by City and State law. The parties therefore agree that the relevant geographic labor market for firefighter applicants is the City and County of San Francisco. However, upon application of the City, the Court may delete or modify this residency requirement in order to effectuate the purposes of this Decree and to allow the SFFD to recruit well-qualified applicants for entry-level firefighter positions.

4. All entrance and promotional examinations required by this Decree shall be developed and administered by a test development committee consisting of qualified personnel employed by the City's Civil Service Commission and qualified outside experts selected by the City and ap-

proved by the Court. The City will consult with counsel for plaintiffs and plaintiff-intervenors regarding all aspects of test development and administration.

5. Notwithstanding applicable provisions of the City Charter of the City and County of San Francisco, the following shall apply to all entrance and promotional examinations required by this Decree:

(a) The test development committee designated in Paragraph 4 shall determine how that examination shall be weighted, scored, and graded;

(b) In promotional examinations, the test development committee shall determine whether points shall be awarded on the basis of seniority and/or education;

(c) The test development committee shall determine whether any examination shall consist of hurdles which must be passed before an applicant can go on to the next step of the examination;

(d) Examinations shall be exempt from inspection requirements.

The use of a selection procedure or examination shall not justify failure to meet a goal set out herein unless the procedure or examination is shown to be valid under the *Uniform Guidelines on Employee Selection Procedures* and to eliminate or minimize adverse impact consistent with the Uniform Guidelines.

III. HIRING GOALS

6. In order to eradicate the present effects of past employment practices with respect to minorities and women, the City shall adopt and seek to achieve as a long term goal the recruitment, appointment, retention, and promotion of qualified minorities and women in sufficient numbers so as to increase substantially the minority and female composition of the San Francisco Fire Department, so that it more nearly reflects the racial, ethnic, and sex-

ual composition of the relevant labor force of the City and County of San Francisco. For the purposes of this Decree, the long term goal of the City shall be to raise the minority representation to forty percent (40%) and the female representation to ten percent (10%) of the sworn personnel of the San Francisco Fire Department.

7. The hiring and promotional objectives set forth herein are goals rather than quotas. Nothing herein shall be interpreted to require the hiring and promotion of unqualified persons. In order to meet these goals the City shall carry out an aggressive and specifically delineated recruitment plan, developed with the assistance of all parties, to identify, recruit, and retain well-qualified applicants for positions in the SFFD. Applicants for positions in the SFFD must be at least 18 years of age.

8. The following provisions shall apply to the provisional firefighters hired pursuant to the Court's order of February 26, 1987:

(a) They shall receive all economic and fringe benefits, including accrual of vacation, sick leave, and other normal benefits of employment, as though they had been appointed permanent entry level firefighters in the normal course;

(b) They shall be allowed to take a special examination developed by the SFFD Bureau of Training to test job knowledge, performance, and fitness no later than October 1, 1988. Upon successful completion of said examination, they shall be treated as though they had been appointed as probationary firefighters in the normal course of SFFD hiring procedures, and shall acquire permanent status, with appropriate seniority dates, as of the dates of their original appointments.

9. For all hiring and promotions which take place while this Decree is in effect the word "goal" shall mean a target figure for hiring, promotion, or any other relevant employment purpose. If a goal specified in the Con-

sent Decree is not reached within the specified time period as to that goal, then the City shall present to the Court the reasons for the failure to meet the goal, and if the reasons presented are found unlawful or inadequate, a plan for meeting the goal within a specified period of time. The Court shall determine the adequacy of reasons and plans in relation to goals that are not reached, and the Court shall retain the power to order lawful actions and remedies, in addition to those specified in this Consent Decree, to accomplish the achievement of goals that the defendants have failed to meet. For purposes of evaluating the City's progress in meeting the hiring goals specified in this Decree, it is agreed that at least 500 entry level firefighters will be hired during the life of this Decree. If the City does not meet this level of hiring, the parties may move the Court to alter the hiring goals specified herein.

(a) *Women.* For each entrance examination administered during the life of this Decree the overall goal for the hiring of women shall be ten percent (10%).

(1) Fifty percent (50%) of this goal will be targeted for minority women;

(2) A higher goal may be imposed if recruitment and selection efforts reveal there are sufficient qualified candidates.

(b) *Minorities.* For each entrance examination administered during the life of this Decree the overall goal for the hiring of minorities, to be achieved by affirmative and aggressive recruitment efforts, shall be fifty-five percent (55%). For each minority group protected under this Decree (Asian, Black and Hispanic) the minimum goal shall be the CLF percentage as reflected in the official 1980 and 1990 U.S. Census Reports. As of the date of this Decree, those figures are

deemed to be Asians, 19 percent; Blacks, 10 percent; Hispanics, 11 percent.

10. Notwithstanding the applicable provisions of the San Francisco City Charter, the City may determine, in light of difficulties of administration and anticipated hiring needs, to test less than all of those persons who apply to take an entry level examination. In the event that the City decides to utilize this provision, it shall insure that those being tested reflect the racial, ethnic, and sexual composition of the entire pool of those who apply to take the particular examination. Those selected for testing pursuant to this provision shall be chosen by random selection.

IV. PROMOTIONS

11.(a) The Fire Department shall immediately appoint Robert Demmons, Audry Lee, Jimmie Braden, Worthy Brooks, Tyrone Rockett, and Bernie Wangara to the position of permanent fire lieutenant with a retroactive date of appointment of March 9, 1979, and award them backpay from that date, taking into account the applicable base rates of pay for fire lieutenant and their actual regular earnings (not including overtime) plus interest since that date.

(b) The City's Civil Service Commission shall give a special examination similar to the 1984 examination for the position of fire captain (H-30) to the six black firefighters promoted to the position of fire lieutenant pursuant to the provisions of this Paragraph 11(a). The examination shall be administered following an adequate opportunity for study and preparation no later than April 1, 1988. The results of that make-up captain's examination will be integrated with the existing list for promotion to fire captain, so that the scores of those who take the make-up examination are statistically correlated with those who took the examination leading to the existing captain's list. At that time the order freezing promotions from that list shall be lifted. Those Black fire-

fighters whose score on the make-up captain's examination would place them within the range of those already promoted to captain from the existing captain's list will be immediately promoted to the position of fire captain, with their seniority in that position determined retroactively. The other Black firefighters who pass the special examination for fire captain will remain on the captain's eligibility list until either they receive promotions or the list expires.

12. For each promotive examination given during the lifetime of this Decree, the goal for the promotion of minorities and women shall be the percentage of minorities and women in the eligible applicant pool. For the purposes of this section "applicant pool" is defined as those who are eligible to and do participate in the examination process until its completion or they are disqualified.

13. The City will give the following promotive examinations according to the schedule and stipulations set forth herein:

(a) Fire Lieutenant (H-20), no later than December 31, 1988. The entry level firefighters hired pursuant to the Court's order during 1987 may take this examination.

(b) Battalion Chief (H-40), no later than December 31, 1988. This examination shall be given no sooner than six months following the promotion of any Black lieutenant whose immediate appointment to the position of fire captain is required by Paragraph 11. The City agrees that absent approval by counsel for plaintiff-intervenors of a larger number, no more than five promotions to the position of battalion chief will be made during each twelve-month period from the eligibility list established as a result of this examination. The City will give counsel for plaintiffs and plaintiff-intervenors 15 days advance notice of each appointment to be made from that list. Furthermore, notwithstanding the provisions of Paragraph 14, this list may be extended with Court ap-

proval if necessary to effectuate the purposes of this Decree while allowing the SFFD to fill vacancies in the position of battalion chief.

(c) Fire Captain (H-30), no later than December 31, 1989.

(d) Fire Lieutenant (H-20), no later than December 31, 1990. However, this examination shall be given no sooner than 10 months after the graduation from the Fire College of at least 90 firefighters hired pursuant to Paragraph 9 of this Decree.

(e) Battalion Chief (H-40), no later than December 31, 1990. However, this examination shall be given no sooner than twelve months following adoption of a list of eligibles from the 1989 examination for fire captain. Furthermore, this examination shall not be given without Court approval until such time as there are at least 10 Blacks holding the permanent rank of captain or above.

(f) Fire Captain (H-30), no later than December 31, 1991. However, this examination shall be given no sooner than twelve months following adoption of a list of eligibles from the the 1990 examination for fire lieutenant.

(g) Fire Lieutenant (H-20), no later than December 31, 1992. However, this examination shall be given no sooner than 10 months after the graduation from the Fire College of at least 180 firefighters hired pursuant to Paragraph 9 of this Decree.

(h) Battalion Chief (H-40), no later than December 31, 1992. However, this examination shall be given no sooner than twelve months following adoption of a list of eligibles from the 1991 examination for fire captain.

(i) Fire Captain (H-30), no later than December 31, 1993. However, this examination shall be given no sooner than twelve months following adoption of a list of eligibles from the 1992 examination for fire lieutenant.

(j) Fire Lieutenant (H-20), no later than December 31, 1994. However, this examination shall be given no sooner than 10 months after the graduation from the Fire College of at least 270 firefighters hired pursuant to Paragraph 9 of this Decree.

14. The purpose of the preceding schedule for promotional examinations is to maximize the opportunity for advancement and promotion of all members of the San Francisco Fire Department, particularly minority persons and women. Notwithstanding the provisions of San Francisco City Charter Section 8.330, all eligibility lists created as a result of the examination schedule set forth in Paragraph 13 shall expire two years following their creation, unless the Court, upon application, agrees to extend the lifetime of any such list in order to effectuate the goals and purposes of this Decree.

15. In order to expedite the resolution of disputes concerning examinations given pursuant to this Decree, the following provisions shall supersede applicable provisions of the San Francisco City Charter:

(a) The Civil Service Commission shall retain authority to hear and decide upon candidate protests which relate to alleged irregularities in the administration of the examination itself, typographical errors, computational errors in scoring, and a listing of candidates on tentative eligible lists. All such protests must be filed within five business days of notice of the occurrence of the event giving rise to the protest. All such protests will be resolved by the staff of the Civil Service Commission within 30 days of their filing, and such decisions shall be final.

(b) An applicant may exercise only one appeal with respect to any given issue. Appeals by more than one person regarding the same issue may be consolidated for purposes of resolution.

(c) Any other protests regarding examinations given pursuant to this Decree may be filed only by the United

States, Local 798, the San Francisco Black Firefighters Association or its successor, or counsel for private plaintiffs and plaintiff-intervenors. All such protests must be filed within seven business days of notice of the occurrence of the event giving rise to the protest. All such protests will be heard by a hearing officer and resolved within 60 days of the date of filing of such protest. The decision of such hearing officer shall be final.

(d) A permanent hearing officer and substitute hearing officers shall be designated by the City, subject to the Court's approval, from lists of qualified administrative law judges provided by the State of California Office of Administrative Hearings.

16. Within sixty days of the execution of this Decree by the City and counsel for plaintiffs in intervention, the Department shall promote eleven Black firefighters (in addition to those appointed pursuant to the provisions of Paragraph 11), eight Hispanic firefighters, and eight Asian and Filipino firefighters from their current positions to positions as fire lieutenants. These promotions shall be made from the lists generated as a result of the 1984 examination for the position of fire lieutenant, selecting those for promotion who scored highest on said examination.

In addition, the City may fill up to 48 existing vacancies in the rank of fire lieutenant with persons who took the 1984 H-20 examination, choosing the persons who scored highest on that examination. Consistent with the applicant pool for that examination, minorities shall comprise twenty-five percent of the persons appointed and each minority group shall receive its pro-rata share of the appointments made. If all 48 positions are filled, those appointed shall include five Blacks, five Hispanics, and two Asians and Filipinos. No person found by the Court to have violated the Civil Rights Acts of 1866, 1871, or 1964, as amended in 1972, and the State and Local Fiscal

Assistance Act while employed by the SFFD shall be promoted to lieutenant pursuant to the provisions of this paragraph.

V. TRAINING AND SUPPORT SERVICES

17. All uniformed members of SFFD shall receive training on sexual and racial harassment and human relations. The SFFD shall consult with plaintiffs and their counsel in developing the curriculum for training.

18. SFFD will insure that all male and female firefighters are assigned properly fitting uniforms, gear, and equipment, and that their living facilities will be developed to insure both personal privacy and integration into the ranks of the Department.

VI. INDIVIDUAL CLAIMS OF DISCRIMINATION

19. All present Black uniformed employees of the San Francisco Fire Department and former employees Jerome Pittman and Anthony Horn who claim that they have been subjected to racial harassment or other forms of racial discrimination since March 9, 1981, shall be entitled to present their claims for resolution under the system outlined below. In addition, those Black firefighters who filed charges of discrimination with respect to the 1978 lieutenant's examination and who allege that they have suffered racial harassment as a result of filing such complaints shall be entitled to utilize this procedure to resolve such charges of racial harassment. However, no claim relating to discrimination in the development or administration of a promotional exam may be heard pursuant to this procedure.

(a) All claims to be resolved pursuant to this section must be submitted to the City Attorney within 60 days of the entry of the order approving this Decree. Claims must be submitted on forms to be developed by the City and plaintiff-intervenors.

(b) Claims shall be heard by the Court or by a Special Master appointed by the Court.

(c) All claims shall be heard and resolved within nine months of the entry of the order approving this Decree.

(d) Three weeks prior to any hearing scheduled to resolve a claim pursuant to this section the claimant shall serve upon the City a brief statement including a summary of the alleged transactions underlying the claim and the name of each witness who will testify and a summary of his or her expected testimony.

(e) Two weeks prior to the hearing scheduled to resolve a claim submitted pursuant to this section, the City shall serve upon claimant a brief statement including a summary of the facts underlying the defense to the claim and the name and expected testimony of each witness to be presented at the hearing.

(f) At any time prior to a decision made regarding each claim, the parties may agree to a final and binding settlement of that claim.

(g) The parties shall cooperate in informal and formal discovery efforts to prepare for the hearing of each claim.

(h) The hearings will be conducted and shall conform to the Federal Rules of Evidence, except that the parties may introduce in evidence written affidavits, medical records, property repair estimates, and Fire Department reports, all subject to objections based upon the authenticity of said documents.

(i) All decisions regarding standing, liability, and remedies, including attorney's fees and costs, shall be made and rendered pursuant to Title VII of the Civil Rights Act of 1964, as amended in 1972, the Civil Rights Acts of 1866 and 1871, the State and Local Fiscal Assistance Act, the Federal Rules of Civil Procedure, and Title 28, United States Code, and relevant case law.

(j) Nothing contained herein shall limit the post-trial and appellate remedies available to the claimant and the City in the event of an adverse decision by the Court or the Special Master.

VII. RESOLUTION OF DISPUTES

20. The Fire Department shall establish and maintain throughout the life of this Decree an informal mediation process under the direction of the Department's Director of Human Relations to informally resolve complaints or problems concerning discrimination or harassment. Participation in this mediation process shall be voluntary and shall not foreclose resort to any other procedure available for making and resolving complaints of discrimination and harassment.

21. The Fire Department shall maintain a General Order forbidding discrimination and harassment. A copy of that order and the procedures for its enforcement is attached hereto as Exhibit "B."

VIII. MONITOR

22. The Court shall appoint a Monitor to act as a Special Master under F.R.C.P. Rule 53 to insure compliance with this Decree.

23. The Monitor shall meet at least bimonthly with the parties to review progress made in the implementation of this Decree and to resolve disputes arising under it.

24. The Monitor shall have the following powers:

(a) To interview any officer or member of the San Francisco Fire Department;

(b) To inspect and review all records and documents maintained by the Department relevant to the implementation of this Decree;

(c) To visit and observe the activities at any Department facility when necessary to carry out the functions of his or her position;

(d) To resolve, subject to review by the Court, all disputes, including disputes concerning the qualifications of persons designated by the SFFD to carry out its obligations under this Decree, which may arise among the parties concerning the implementation of this Decree.

25. The Monitor shall report to the Court semi-annually the progress being made by the defendants in implementing the terms of this Decree. Said report shall be served on all parties to the action.

26. The Monitor shall hear appeals from all decisions made by the Chief of the Department on complaints of harassment or discrimination. The Monitor's decisions with respect to said complaints may be appealed to the Court.

IX. DUTY OF COOPERATION

27. The City agrees to meet with counsel for the other parties at least bi-monthly throughout the life of this Decree in good faith efforts to insure compliance with the terms of this Decree and to develop such programs and procedures, including recruitment plans and test development, as are required by it. The City shall provide the funding and resources required to carry out its obligations under this Decree. The City agrees to interpret this Decree according to its letter to the Court of November 12, 1987, which is attached hereto and incorporated herein as Exhibit C.

X. DURATION OF THE DECREE

28. This Consent Decree shall remain in effect for seven years from the date of the Court's order approving it. However, the Court may on its own motion or motion of a signatory modify or extend the duration of this Decree for up to three years if necessary to effectuate the goals and policies underlying it.

XI. NOTICE AND OBJECTIONS

29. Within the time ordered by the Court, the City shall give notice of this Decree to the classes represented by plaintiffs and plaintiff-intervenors in the form required by the Court.

XII. ATTORNEYS' FEES AND COSTS

30. The issue of the costs and attorneys' fees due to counsel for the parties to this action shall be heard and resolved by the Court or a Magistrate or Special Master appointed by the Court for that purpose.

The parties whose signatures appear below request the Court to issue its Order approving and requiring the foregoing provisions.

DATED: November 12, 1987.

/s/ Louise H. Renne
LOUISE H. RENNE
City Attorney
Attorneys for Defendants
City and County of San Francisco, *et al.*

/s/ Eva Jefferson Paterson
EVA JEFFERSON PATERSON
Attorney for Plaintiff-Intervenors

/s/ Shauna I. Marshall
SHAUNA I. MARSHALL
Attorney for Plaintiff-Intervenors

/s/ Russell Galloway
RUSSELL GALLOWAY
Attorney for Plaintiff-Intervenors

/s/ Edwin M. Lee
EDWIN M. LEE
Attorney for Plaintiff-Intervenors

/s/ Dan Siegel
DAN SIEGEL
Chief of Complex Litigation
Attorneys for Defendants
City and County of San Francisco, *et al.*

/s/ William C. McNeill, III
WILLIAM C. MCNEILL, III
Attorney for Plaintiff-Intervenors

/s/ Denise M. Hulett
DENISE M. HULETT
Attorney for Plaintiff-Intervenors

/s/ Mary Dunlap
MARY DUNLAP
Attorney for Plaintiff-Intervenors

DUANE W. RENO
Attorneys for Defendant-Intervenor Local 798

SO ORDERED.

/s/ Marilyn Hall Patel
United States District Judge

EXHIBIT A

1. Defendants are permanently enjoined from engaging in any act or practice that has the purpose or effect of unlawfully discriminating against any employee of, or any applicant for employment with, the San Francisco Fire Department because of such individual's race, sex, or national origin, and specifically from unlawfully discriminating at any time on the basis of race, sex, or national origin in hiring, promotion, upgrading, training, assignment, discharge, compensation, and terms and conditions or privileges of employment. Defendants shall take reasonable steps to assure that no member of the San Francisco Fire Department retaliates against any person because that person has opposed discriminatory policies or practices or because of that person's participation in or cooperation with the initiation, investigation or litigation of any charge of unlawful dscrimination based on race, sex, or national origin, or the administration of this order.

2. The defendants shall not use any selection procedure that has an adverse impact on blacks, Hispanics, Asians, or women in hiring or promotion unless the procedure can be shown to be valid or otherwise justified by business necessity, all in accordance with Title VII and the provisions of the *Uniform Guidelines on Employee Selection Procedures*, 28 C.F.R. 50.14, or successor guidelines.

3. Defendants shall maintain and adequately fund a program of recruitment and training directed at increasing the number of qualified Black, Hispanic, Asian, and female applicants for firefighter positions. Recruitment resources shall be allocated to insure that the Department's hiring goals as to each underrepresented group are met. This recruitment program shall be headed by a designated recruitment coordinator and shall include, but need not be limited to:

(a) the use of media, including media specifically targeted to Asian, Black, and Hispanic communities and women;

(b) developing and maintaining contacts with Black, Hispanic, Asian, and women's community organizations to inform their respective memberships and constituencies of employment opportunities;

(c) active use of Black, Hispanic, Asian, and female uniformed personnel in recruitment activities; at least two individuals from each group shall be designated well in advance of required recruitment efforts, given adequate training, and be provided with sufficient support to carry out these duties;

(d) training programs and such other efforts as are necessary and appropriate to advise Blacks, Hispanics, Asians, and women of employment opportunities as firefighters; and

(e) training and retention programs that will assist Blacks, Hispanics, Asians, and women to obtain the necessary kills (sic) to qualify for firefighter positions.

5. Defendants shall make no appointments to the position of H2 firefighter until this order has been fully complied with or leave of court is obtained pursuant to the terms set forth in paragraphs 15 through 20 below.

6. Defendants shall not adopt any eligibility list nor make any appointment on an acting, provisional or permanent basis to the ranks of fire inspector (H4) or fire lieutenant (H20) which are based in any way on the selection procedures developed and administered pursuant to the 1984 job announcement for those ranks.

8. Defendants shall develop selection procedures for the entry and promotional classifications within the SFFD which are consistent with Title VII and the *Uniform Guidelines*, and shall establish new entry-level firefighters

and promotional eligibility lists based upon those procedures.

9. The City shall develop new selection procedures for the ranks of firefighter (H2), fire inspector (H4), and fire lieutenant (H20) which shall be job-related and comport with Title VII and the *Uniform Guidelines.* The City shall complete development and administration of the H2, H4, and H20 examinations as soon as possible, with development of the examinations by December 31, 1987, and with administration of the examinations no later than March 31, 1988.

12. Commencing within ninety (90) days of the date that this order is entered and semi-annually thereafter, the defendants shall file with the court, the United States and counsel for plaintiff-intervenors a report disclosing the following information:

(a) current firefighter eligibility lists showing the race, sex, and national origin of the candidates; a list of all pending entry level appointments at least 10 days prior to notification of the appointees;

(b) summary information showing by race, sex, and national origin, the numbers of applicants who applied for, took, and passed each component of the selection process administered during that reporting period;

(c) a listing of all uniformed Fire Department employees arranged by job title, race, sex, and national origin;

(d) a listing of all appointments (both initial and promotional) in uniformed positions made during the reporting period arranged by job title, race, sex, and national origin;

(e) a listing by name, race, sex, national origin, and job title of all persons terminated from a uniformed position with the Fire Department, noting the reason for that person's termination; and

(f) a listing by name, race, sex, national origin, and job title of all persons who voluntarily resigned from a uniformed position with the Fire Department, noting, if known, the reason for that person's resignation.

Each semi-annual report shall be accurate as of the first day of July and January of each year and shall be filed with the court, the United States and counsel for plaintiff-intervenors no later than August 1 and February 1 respectively. In addition, defendants shall furnish written reports to the United States and counsel for plaintiff-intervenors on matters pertaining to compliance with the order, upon written request.

13. During the time period that this order is in effect, the defendants shall retain all records relating to the recruitment, selection, appointment, promotion, training, evaluation, assignment, and discipline of persons for uniformed positions in the Fire Department, including:

(a) all applications, including applications for hire, transfer or promotion identified by race, sex, and national origin;

(b) examinations, evaluations or records of any nature showing the performance of firefighters on the job or at the training academy;

(c) all written communications between the defendants and applicants for employment, transfer, and promotion;

(d) all records relating to the implementation of the recruitment obligations of this order including a list of all organizations and/or schools that were contacted for recruitment purposes, showing the date and nature of the contact; and

(e) all records relating to the adverse impact and/or validity of selection procedures utilized to fill entry-level or above entry-level firefighter vacancies.

The United States and counsel for plaintiff-intervenors shall have the right to inspect and/or copy for their use in connection with enforcement of this order any or all of the records described above, upon reasonable notice to the defendants. The United States and counsel for plaintiff-intervenors may request inspection or copying of other records for good cause shown upon application to the court.

14. This order shall continue in full force and effect for a period of seven years. At any time after such seven-year period, defendants may, upon forty-five (45) days notice to the United States and plaintiff-intervenors, file an order of dismissal with the court, which shall be entered unless the United States or plaintiff-intervenors, upon motion served and filed before the proposed date of entry of the order of dismissal, and after a hearing by the court, shows good cause for continuations of this order in whole or in part. During the effective period of this order, the court shall have continuing jurisdiction for the purpose of effectuating its purposes and terms, and providing for its enforcement.

APPENDIX B

Dan Siegel
Chief of Complex Litigation
(415) 554-4229

November 12, 1987

Honorable Marilyn Hall Patel
Judge, U.S. District Court
450 Golden Gate Avenue
Courtroom 5
San Francisco, CA 94102

Re: *U.S.A. et al. v. CCSF et al.*
U.S.D.C. Nos. C84-7089/C84-1100
MHP Consolidated

Dear Judge Patel:

This letter is written to clarify the City's interpretation of and obligations under certain sections of the Consent Decree. It should be considered as part of the Consent Decree in the event that disputes later arise as to its interpretation.

First, the City will utilize its best efforts to insure its compliance with all terms of the Decree. It undertakes its obligations in good faith and with an enthusiastic commitment to the goals and purposes of the Decree.

Second, it is important to understand the assumptions and intentions of the parties with respect to promotions to the position of battalion chief and tests for that position under Paragraph 13, subparagraphs (b) and (e) of the Consent Decree. The City's assumption is that there will be 49 retirements from positions of battalion chief and above during the period 1988 through 1994. This means that there will be an average of seven vacancies each year. Under subparagraph 13(b), the City has obligated itself to make no more than five appointments each year for the two years during which the elig-

ibility list developed as a result of the 1988 examination for battalion chief is in effect. The purpose of making this commitment is to insure that promotional opportunities exist when the battalion chief examination scheduled for 1990 is given. The parties assume that at the time of the 1990 battalion chief examination, there will be a substantial number of Black captains eligible to take that examination. The City has agreed that absent Court approval it will not give that examination until there are 10 Blacks holding the permanent rank of captain or above. The City agrees that should there be fewer vacancies in the chiefs' ranks than it assumes, the plaintiffs in intervention should be allowed to seek further relief in order to insure that there are vacancies for which Black captains may realistically compete during the lifetime of this Decree. The City is also concerned about this provision in that vacancies may arise sooner and in greater numbers than anticipated. With a limitation of only five appointments yearly in the first two years, and a restriction in giving a second battalion chief's examination until there have been a total of at least 10 Blacks appointed to positions as captain or above, the Department could find itself with a great number of unfilled vacancies despite having complied with the Decree in all respects. In that event the City would return to Court to request relief, either in the form of allowing additional appointments from the list generated by the 1988 battalion chief's examination or in proceeding with the 1990 examination with a smaller number of Black captains than anticipated in the Decree. The City has advised the Court and counsel that it will seek to utilize the latter option only in the event that there are at least seven Blacks holding the permanent rank of captain or above.

The City also agrees that when it is required to utilize existing captains to fill temporary appointments to the position of battalion chief, it will select those captains on the basis of seniority, current assignments, qualifications, and affirmative action considerations. This process

will allow minority captains to gain experience as battalion chiefs.

Third, the following procedure will be used to insure that no persons guilty of civil rights violations are promoted to lieutenant pursuant to Paragraph 16. The list of proposed appointees will be submitted under seal to the Monitor, who will investigate the backgrounds of the persons to be appointed. The Monitor will insure that confidentiality is protected, although she may discuss proposed appointees with the Department, counsel signatories to the Decree, and witnesses to alleged civil rights violations. In the event that objections are raised with respect to any appointee, the facts giving rise to such objections must be submitted to the Monitor under penalty of perjury after being screened by counsel for plaintiff-intervenors. The City's position is that the Monitor should reject any challenges which are not reflected in existing complaints or in materials developed in preparation for this litigation. However, the Court has agreed with plaintiff-intervenors that all challenges should be considered and that frivolous complaints should be rejected. The Monitor shall make recommendations concerning any disqualifications to the Court. Any person whose appointment is challenged under this proceeding shall be given notice by the Monitor and shall be allowed to present evidence refuting the challenge to the Monitor. The Court may receive written and oral evidence with respect to such challenges and shall make a final ruling on the matter. All appointments to lieutenant under Paragraph 16 will be made simultaneously following the resolution of all challenges.

Fourth, the City has agreed that in appointing Black firefighters to the position of lieutenant pursuant to Paragraph 16 of the Decree, it will give particular consideration to those Black firefighters who took the 1978 examination for Fire Lieutenant. One attorney designated by counsel for plaintiffs and plaintiff-intervenors

will participate in the process of selecting the Black firefighters to be promoted pursuant to this paragraph.

Fifth, the City will investigate a challenge to the *bona fides* of an existing fire lieutenant's claim to be of Asian ancestry. In the event that this individual is found not to be an Asian pursuant to EEOC guidelines, an additional Asian firefighter will be promoted to lieutenant under Paragraph 16 of the Decree.

Sixth, it is agreed that Clydelho Frommoethelydo is considered to be Black for purposes of allowing him to present a claim of discrimination under Paragraph 19 of the Decree. It is understood that the doctrine of continuing violation applies to the individual claims of discrimination.

Seventh, within twelve months of the execution of this Decree, the parties will meet and discuss the feasibility of conducting a needs assessment study to determine locations and positions in the SFFD where designated bilingual positions would serve the purpose of increasing public safety.

Very truly yours,

LOUISE H. RENNE
City Attorney

/s/ Dan Siegel
DAN SIEGEL
Chief of Complex
Litigation

APPENDIX C

UNITED STATES DISTRICT COURT
N.D. CALIFORNIA

Nos. C-84-7089 MHP, C-84-1100 MHP

UNITED STATES OF AMERICA,
Plaintiff,

v.

THE CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendants.

FONTAINE DAVIS, *et al.*,
Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendants.

Feb. 26, 1987

Shauna Marshall, Donna J. Hitchens, Terisa E. Chaw, Equal Rights Advocates, San Francisco, Cal., William C. McNeill, III, Pearl, McNeill, Gillespie & Standish, Oakland, Cal., Eva Jefferson Paterson, San Francisco Lawyers' Committee for Urban Affairs, San Francisco, Cal., Henri Norris, Oakland, Cal., Mary C. Dunlap, San Francisco, Cal., David L. Rose, Gerald F. George, Joel W. Nomkin, U.S. Dept. of Justice, Civil Rights Div.,

Washington, D.C., Theresa Fay Bustillos, Los Angeles, Cal., (MALDEF-intervenor), Edwin M. Lee, Asian Law Caucus, Inc., San Francisco, Cal., for plaintiffs.

George Agnost, Philip S. Ward, Michael C. Killelea, Deputy City Attys., San Francisco, Cal., for City & County of San Francisco, Civil Service Comm'n, Emmet Condon, John Walsh.

Noel Edlin, Hassard, Bonnington, Rogers & Huber, San Francisco, Cal., for City of Oakland, Henry Gardner, George Hart, Lawrence Eades, defendants.

Michael C. Killelea, Deputy City Atty., San Francisco, Cal., Christopher D. Burdick, David P. Clisham, Carroll, Burdick & McDonough, San Francisco, Cal., for San Francisco Citizens for the Merit System, Robert Farac, Robert Rey, Oscar Bazurto, Tom Rey, et al., intervenor.

Duane W. Reno, Davis & Reno, San Francisco, Cal., for San Francisco Fire Fighters, Local 798, Intern. Ass'n of Fire Fighters, etc., Patrick K. Ebert, Kenneth R. Ross, Brian A. Ballard, Mark A. Ballard, Timothy M. Smith, Michael J. Smith, Russell S. Sherman, Fontaine Davis, Eric H. Washington, Jerilyn North, Robert L. Demmons, Jimmie Braden, Audry Lee, Early Davis, Brandi Swanson, Susan Moorehead, Anne Young, Mary M. Carder, Theresa Rodigou, Kathleen J. Bradshaw, Patricia M...Tay, Intern. Ass'n of Black Firefighters San Francisco Chapter, intervenors.

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

PATEL, District Judge.

This is an employment discrimination action against the San Francisco Fire Department ("SFFD") initially brought by the United States and now joined in intervention by various individual and organizational plain-

tiffs and defendants. Plaintiffs allege that the City's administration of certain employment examinations for entry-level hiring and promotional decisions unlawfully discriminated against women and minority groups, all in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* These examinations include the 1982 H2 entry-level firefighter exam, the 1984 H4 fire inspector exam, and the 1984 H20 fire lieutenant exam. During the pendency of this action, defendants have not hired or promoted anyone from any appointment list generated by the challenged examinations. This is partly attributable to a preliminary injunction entered by the court in February 1986, enjoining the SFFD from utilizing the H2 examination for any employment purpose.

On June 23, 1986, the court found that the H2 entry-level examination adversely impacted women and minorities. In its subsequent pretrial statement, the City conceded that the H20 promotional examination additionally resulted in an adverse impact on certain minority groups. After lengthy settlement negotiations and on the eve of trial, scheduled to begin in October 1986, the City announced that it would no longer attempt to defend the validity of these examinations, as required in a Title VII action after a showing of adverse impact. The City Attorney asked the City's Civil Service Commission to cancel the 1982 H2 and 1984 H20 employment procedures, as well as the 1984 H4 fire inspector procedure. The Civil Service Commission cancelled the H2, H4, and H20 procedures in late October and early November, 1986.

Plaintiff-intervenors now move for partial summary judgment and declaratory relief on the basis of the City's abandonment of the validity of its H2, H4, and H20 exams. Their motion is "partial" insofar as it does not encompass the entirety of their pattern and practice claim, additional elements of which they contend must be tried at a later date. Plaintiff United States moves sep-

arately for summary judgment on essentially the same grounds, but seeks injunctive relief. For the reasons herein set forth, the court grants partial summary judgment and awards injunctive relief pursuant to the terms outlined below. In response to the informal application of defendant City of San Francisco, the court additionally outlines the procedures to be used by the City if it wishes to engage in interim hiring to avert a "firefighting crisis" which Fire Chief Condon now declares "could occur at any time."

I. FACTUAL BACKGROUND

A. *Previous Litigation*

Prior to 1955, the San Francisco Fire Department employed no black firefighters. In 1970, the City of San Francisco had approximately 1800 uniformed fire personnel, of whom four were black. The same year, the N.A.A.C.P. and various other community organizations brought suit against the SFFD for employment discrimination in *Western Addition Community Organization [WACO] v. Alioto*, C-70-1335 WTS. The action proceeded as a class action, although the court never formally certified a class save for purposes of settlement only in its consent decree of May 18, 1977.

In 1971 the court in *WACO v. Alioto* declined to preliminary enjoin the SFFD from utilizing its 1968 H2 entry-level firefighter examination for further employment purposes, even though the court had found that the examination adversely impacted minority applicants. *WACO v. Alioto*, 330 F.Supp. 536 (N.D.Cal.1971). The court indicated that an injunction was not necessary in light of representations made by the City that it intended to modify the examination "with a view to widening minority group representation in the Fire Department. . . ." 330 F.Supp. at 540. The court noted that discussions between the parties regarding the modification of the exam had been conducted "constructively and

in good faith," and that the City was "aware of the disproportionate representation of [minorities and is] desirous of making [the Fire Department] more representative if that can be done without impairing departmental efficiency." *Id.*

As a result of the negotiations among the parties, the City administered a modified examination in 1971. This examination again adversely impacted minority groups, and hiring from the new list was enjoined by the *WACO* court after the City failed to make any persuasive showing of the new exam's job-relatedness. *WACO v. Alioto*, 340 F.Supp. 1351, 1356 (N.D.Cal. 1972). The court stated that "[t]his is doubly regrettable first, because with a little more effort to comply with the fairly well-established requirements of the law in this field, [the defendants] might have been able to do so; secondly, there is no doubt that the Commission, far from entertaining any intent to racially discriminate, means well and has tried in its own way to improve minority representation in the Fire Department without impairing departmental efficiency. . . ." 340 F.Supp. at 1356.

In 1973 the City again approached the court with a reconstructed entry-level examination. Again the court found that the City could not demonstrate the validity of the examination, and expressed its increasing exasperation at the City's repeated failure to establish an acceptable entry-level employment procedure. *WACO v. Alioto*, 360 F.Supp. 733, 739-41 (N.D.Cal.1973). The court wrote that "[t]he time has come—especially after the City has twice failed to satisfactorily demonstrate the validity of its Fireman H-2 written examination tests —for the City to seriously, rather than superficially and speciously, face up to the problem presented to it by [Title VII] by further efforts to rebut or correct the already legally established presumptive discriminatory effect of its selection procedures." 360 F.Supp at 739. The court enjoined the use of the written portion of the

examination, ordered the Civil Service Commission to utilize only the oral and athletic components of the employment procedure to rank applicants, and further ordered the Commission to proceed with diligence to to empirically validate its H2 written test. 360 F.Supp. at 740.

Late in 1973, after the City failed to either validate the H2 written exam or hire additional firefighters pursuant to the terms authorized by prior opinions, the court in *WACO ordered* affirmative relief. The court recited a litany of the City's failures to comply with previous orders of the court, and concluded that "[t]he [Civil Service] Commission's dilatoriness in these matters and apparent stubborn insistence upon arguments and alternatives which this court has repeatedly found unacceptable, have created an intolerable situation; the adequacy of Fire Department manpower for the safety of the City is coming into question; all Fireman H-2 applicants, both minority and non-minority, have been kept in a state of uncertainty for several years and the rights of minority applicants to a more prompt correction of the City's still unvalidated selection procedures are involved." *WACO v. Alioto*, 369 F.Supp. 77, 80 (N.D. Cal.1973), *aff'd*, 514 F.2d 542 (9th Cir.1975), *cert. denied*, 423 U.S. 1014, 96 S.Ct. 446, 46 L.Ed.2d 385 (1975). The court accordingly ordered the City to hire one minority for each non-minority hired from the H2 appointment list until all minority applicants on the list had been employed. 369 F.Supp. at 81. The list expired in 1978. Over 55% of the minorities who have joined the SFFD were hired pursuant to this court-ordered arrangement.

A consent decree dated May 18, 1977, terminated *WACO v. Alioto*. In the decree, the court stated that "plaintiffs have demonstrated a prima facie case of racial and national origin discrimination in defendants' manner of entry-level firefighter selection. The court has also found that evidence submitted by defendants up to

November 1973 was not sufficient to discharge their burden of proof to explain the disproportionate selection ratios of racial and national origin minority individuals." *WACO v. Alioto*, No. C-70-1335-WTS, consent decree at 2 (N.D.Cal. May 18, 1977). The decree approved the use of a written examination for entry-level firefighters similar to that used by the SFFD in 1973, and also allowed for a physical agility test so long as it "fairly simulate[d] those physical skills expected of successful firefighters." *Id.* The decree stated that

> [i]n view of the agreement of the parties and the defendants' efforts of improving the selection process for entry-level firefighters, there is no need for nor would it be appropriate to impose a further ratio or quota hiring order upon defendants. Therefore, in the future, defendants may appoint firefighters in the order in which they appear on the relevant eligible list constructed as set forth in this Consent Decree. It is a goal of the parties, one which each side expects can affirmatively be reached, that the eligible list for entry-level firefighters shall reflect thereon an equitable distribution of minority candidates within the class conditionally certified herein on the order of 40% of the total number of eligibles.

Id. at 9-10. The decree was to continue in effect for five years, until 1982, and terminate upon the filing by defendants of an order of dismissal with prejudice. The parties to the present action have agreed that the consent decree expired by its own terms in 1982.

While the *WACO* action focused exclusively on the entry-level H2 examination, the SFFD has faced additional challenges to the legality of its promotional examinations. During 1980 the California Department of Fair Employment and Housing (DFEH) received ten complaints from black firefighters alleging that the SFFD's

1978 H20 fire lieutenant promotional examination was discriminatory. The DFEH subsequently determined that the examination adversely impacted minorities, and that the City had failed to demonstrate that the exam was sufficiently job-related under state law to be deemed valid. The City subsequently appealed the administrative decision to the state superior court, which reversed the DFEH ruling with respect to the examination's job-relatedness. This decision in turn was appealed to the state court of appeal, which reaffirmed the administrative ruling that the City had failed to adequately demonstrate the validity of the exam. *City and County of San Francisco v. Fair Employment and Hous. Comm'n*, No. A024145, slip op. (Cal.Ct.App. May 27, 1986). The City then appealed the decision to the California Supreme Court, which ordered the issuance of a final opinion by the court of appeal. The court of appeal subsequently set aside its prior order by opinion dated October 2, 1986, and requested supplemental briefing on the question of appropriate relief. *City and County of San Francisco v. Fair Employment and Hous. Comm'n*, No. A024145, slip op. (Cal.Ct.App. October 2, 1986). Thus while a final decision has not been rendered with respect to the alleged invalidity of the 1978 H20 promotional examination, it nonetheless has been subject to judicial scrutiny in the ongoing state proceeding which essentially mirrors the *WACO* court's critical consideration of the H2 entry-level examination process.

B. *Current Litigation*

In 1982 and 1984 respectively, the SFFD administered newly developed H2 entry-level and H20 lieutenant promotional examinations. In 1984, the SFFD also administered an H4 fire inspector examination. Subsequent to the posting of the 1982 examination's results, plaintiff-intervenors and the United States brought separate actions against the SFFD under Title VII of the Civil

Rights Act of 1964 and the Revenue Sharing Act of 1972 for failure to correct the effects of past discrimination, and for the continued utilization of invalid hiring procedures adversely impacting minorities and women. The action brought by the United States focused on blacks, Asians, and Hispanics, while the plaintiff-intervenors sought relief for blacks and women. The cases were consolidated in 1986. The gravamen of the consolidated complaints regarding current hiring practices centered on the adverse impact of the SFFD's 1982 H2 entry-level firefighter selection procedure, as well as the adverse impact of its 1984 H20 lieutenant promotional procedure and its 1984 H4 selection procedure for fire inspectors.

On April 10, 1985, the court denied the City's motion requesting in the alternative either the dismissal of the complaint or the entry of summary judgment. On February 12, 1986, the court granted plaintiffs' motion to preliminarily enjoin the City from proceeding with plans to immediately hire entry-level firefighters from the appointment list generated by the challenged 1982 H2 examination. On June 23, 1986, the court granted partial summary judgment on plaintiffs' claims that the 1982 entry-level written exam adversely impacted blacks, and that the 1982 physical agility test (PAT) had an adverse impact on women. Since then, the parties have filed a joint pretrial statement which lists these additional issues as undisputed: (1) the adverse impact of the 1982 firefighter H2 selection procedure as a whole on Hispanics and Asians, if the entire appointment list (E-27) is used in rank order; (2) the adverse impact of the 1982 firefighter H2 physical agility test when used as a qualifying examination for blacks, Hispanics, Asians and women; (3) the adverse impact of the 1982 H2 PAT test when used for ranking of women, Hispanics, and Asians; and (4) the adverse impact of the 1984 fire lieutenant H20 selection procedure as a whole, as initially announced, on blacks and Hispanics.

On October 23, 1986, virtually on the eve of trial [1] and after more than two years of tenacious and uncompromising pretrial litigation in defense of the challenged examinations, the City indicated to the court that it no longer intended to defend the validity of the H2, H4, and H20 examinations, and was prepared to request the Civil Service Commission to cancel the use of the exams for any appointments or promotions within the SFFD.[2] On October 27, 1986, the Commission cancelled the H2 and H20 examinations and all resulting eligibility lists. On November 4, 1986, the Commission did the same for the H4 exam.

On the basis of the City's withdrawal of the H2, H4, and H20 examinations and its decision not to defend their validity, the plaintiff-intervenors and United States move for summary judgment.[3]

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[1] The trial was originally scheduled for October 14, 1986; it was subsequently continued to October 21, 1986.

[2] *See, e.g.*, Response of Defendant City to Davis Motion for Partial Summary Judgment, at 3: "the City has already advised the Court that it does not intend to defend the [H2, H4, and H20] examinations in this proceeding or to otherwise attempt to defend their validity under the *Uniform Guidelines*."

[3] Unlike plaintiff-intervenors, the United States dot not move for summary judgment with respect to the alleged illegality of the H4 examination. The government states that it excluded the H4 exam because the parties never stipulated to its adverse impact. Plaintiff-intervenors, in asserting that the defendant has conceded the H4 examination's adverse impact, rely on the City Attorney's repeated public pronouncements to that effect. Furthermore, the City's most recent submission to the court states that "[d]efendants . . . cancelled the examination process for H20 Lieutenant and H4 Inspector. The examinations had adverse impact upon various minority and women candidates." Defendants' post-hearing statement dated January 22, 1987, at 3. The court cannot ignore repeated and explicit admissions on the part of the defendant. For purposes of these motions, the court concludes that the adverse impact of the 1984 H4 examination has been admitted, and that the defendant has chosen not to contest its validity. *See* note 2, *supra*.

II. LIABILITY OF THE CITY UNDER TITLE VII AND REVENUE SHARING ACT

In *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and its progeny (*see, e.g., Connecticut v. Teal*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982)), the Supreme Court has developed a three-part analysis for disparate impact cases brought under Title VII of the Civil Rights Act.[4] First, a plaintiff bears the initial burden of demonstrating that a facially neutral employment practice has a "significantly discriminatory impact." 457 U.S. at 446, 102 S.Ct. at 2530. Once the plaintiff makes this prima facie showing of adverse impact, the burden then shifts to the employer to establish the validity of the employment practice. This requires a "showing that any given requirement [has] a manifest relationship to the employment in question." 401 U.S. at 432, 91 S.Ct. at 854. Finally, the plaintiff may prevail if he or she can show that an otherwise valid employment practice is nonetheless simply a "mere pretext for discrimination." 457 U.S. at 447, 102 S.Ct. at 2530. If the employer cannot demonstrate the validity of the employment procedure, Title VII has been violated. *Clady v. County of Los Angeles*, 770 F.2d 1421, 1428 (9th Cir.1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 1516, 89 L.Ed.2d 915 (1986).

Given the City's various admissions, the factual record is clear: the H2, H4, and H20 examinations adversely impacted minorities and women, and the City will make no attempt to carry its subsequent burden of defending the presumptively suspect examinations in terms of their

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[4] Under *Cohen v. West Haven Bd. of Police Comm'rs*, 638 F.2d 496, 500 (2d Cir.1980), and *United States v. City of Chicago*, 549 F.2d 415, 439-440 (7th Cir.1977), violations for discrimination under the Revenue Sharing Act of 1972 are governed by the standards established in the context of Title VII. A violation of Title VII, therefore, constitutes a separate violation of the Revenue Sharing Act.

"manifest relationship to the employment in question." [5] Thus the H2, H4, and the H20 selection and promotion procedures fall within the definition of employment practices proscribed by Title VII. These facts clearly establish a prima facie violation of law entitling plaintiffs to judgment but for one complicating consideration: because

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[5] Defendant-intervenor Local 798 attempts to resurrect the issue of the examinations' validity by submitting the affidavit of Dr. David Friedlund, attesting to the possible job-relatedness of the H20 exam. He expresses no opinion with respect to the H2 and H4 exams. Local 798 asserts that "[t]he issue of the validity of the examinations that have been withdrawn by defendants has . . . not been clearly established. While the City Attorney has expressed an opinion that the tests are invalid, this 'admission' must be treated as an opinion, and not as an undisputed fact that is binding upon Local 798 and other defendants in this action." Local 798 Opposition at 12-13. Plaintiff-intervenors observe that Dr. Friedlund was retained on November 17, 1986, approximately one month after the scheduled trial date, and is not listed in any discovery responses or in the pretrial statement as among the union's expert witnesses. Thus defendant-intervenor attempts to raise a genuine dispute of fact on this issue with the testimony of an undisclosed expert withness who could not testify at trial.

Furthermore, Dr. Friedlund's declaration itself does not raise a genuine dispute of fact with respect to the H20 examination's validity: he states only that "there would be a good chance to defend this examination if the job analysis were strengthened through an independent review by additional subject matter experts and a link-up analysis were performed to show that there is a strong correlation between the job analysis and the questions that were asked of the applications." Friedlund Declaration at 4. Friedlund thus does not declare that the necessary correlation in fact exists; he only speculates that further analysis *may* establish it. Local 798 offers on the eve of trial only speculation about the possibility of validation at some later date, which must be weighed against the City's flat concession of liability.

Most significantly, defendant-intervenor's argument is fundamentally misplaced and wholly without authority. The City is solely responsible for the development, administration, and evaluation of the challenged examinations. Given its exclusive liability for the validity of the exams, the City's admission of invalidity binds all parties. Defendant-intervenor obviously does not have standing to collaterally attack the City's concession of its own liability.

the unused examinations have now been cancelled by the City, barring the possibility that any firefighter will ever be hired or promoted pursuant to their discriminatory criteria, the court must determine if there remains an adjudicable basis for liability and relief under Title VII. As a question of law resting on facts not genuinely in dispute, the issue is appropriate for summary judgment. *Deukmejian v. United States Postal Service*, 734 F.2d 460, 462 (9th Cir.1984).

A number of arguments have been advanced by the plaintiffs in support of their claim to relief, each of which will be considered in turn. These include (1) that the cancellation of the examinations denies minority and female applicants an employment opportunity, and is thus actionable; (2) that the cancellation of the examinations works to perpetuate past discrimination in a manner violative of Title VII; and (3) that the cancellation of the examinations on the eve of trial constitutes cessation of illegal activity in a manner that does not assure the impossibility of its repetition, and thus need not moot the action nor bar the entry of prospective injunctive relief assuring future compliance with the requirements of the law.

A. *Cancellation of Exams and the Discriminatory Denial of Employment Opportunities*

Plaintiff-intervenors first argue that the City's administration and subsequent cancellation of the H2, H4, and H20 examinations has denied minorities and women an "employment opportunity" in a manner violative of Title VII. Each of the cases relied upon by plaintiffs for this proposition, though, is distinguishable in a critical respect: all involve some type of differential racial treatment in the actual allocation of employment opportunities. Here, plaintiffs' differential racial and sexual treatment has been suffered solely in the context of the discriminatory rankings generated by the various exam-

inations, which now have been withdrawn prior to the allocation of any employment opportunity.[6]

Plaintiffs cite *Connecticut v. Teal*, 457 U.S. at 440, 102 S.Ct. at 2525, in support of the proposition that minority and female applicants have been denied equal employment opportunities, despite the fact that minority, white, male, and female applicants have all equally born the brunt of the City's decision to withdraw the challenged appointment lists. While the holding in *Connecticut v. Teal* does indeed stand for the proposition that more than simply the "bottom line" hiring ratio bears on the legality of an employer's behavior, 457 U.S. at 451, 102 S.Ct. at 2532, it nonetheless requires a plaintiff to show that he or she actually suffered some type of discriminatory treatment in the actual allocation of jobs or promotions. Accordingly, the *Teal* Court held that blacks who had been initialy excluded from a promotional process due to the results of a discriminatory examination could maintain a Title VII action, even though the ultimate result of the process showed no "bottom line" disparity between the number of blacks and whites promoted. As the Court stated, "petitioners seek simply to justify discrimination against respondents on the basis of their favorable treatment of other members of respondents' racial group. Under Title VII, '[a] racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.'" (citation omitted) 457 U.S. at 454, 102 S.Ct. at 2534.

Plaintiffs fix upon the language in *Teal* that a Title VII violation is shown where a member of a protected

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[6] *See County of Los Angeles v. Davis*, 440 U.S. 625, 633, 99 S.Ct. 1379, 1384, 59 L.Ed.2d 642 (1979) ("Indeed, it is extremely doubtful, from this record, that the . . . proposal had any discriminatory effects to redress. The plan, it must be remembered, was never carried out. As a consequence, there has been no finding that any minority job applicant was excluded from employment as a result of the proposal.")

class has been deprived of an opportunity. *Id.* at 448, 450, 102 S.Ct. at 2531, 2532, quoting *New York Transit Authority v. Beazer*, 440 U.S. 568, 584, 99 S.Ct. 1335, 1365, 59 L.Ed.2d 587 (1979). Plaintiffs emphasize the term "opportunity," which is used repeatedly in *Teal*. This language, however, cannot be read in isolation. In *Teal* the employer actually made appointments from the challenged examination and plaintiffs were not among them. Here, where the City ultimately hired and promoted no one, it treated no minority or woman in a manner distinct from white or male applicants for employment purposes, either individually or collectively. *Connecticut v. Teal* does not reach as far as plaintiffs argue.

Plaintiffs rely heavily on *Hall v. City of Auburn*, 567 F.Supp. 1222 (D.Me.1983), for the proposition that the right to equal employment opportunities is violated by the utilization of discriminatory job criteria, irrespective of any ultimate hiring decision. The case involved a woman who was wrongfully excluded from employment on the basis of a written examination. After prevailing in state court on her claims regarding the examination, she won the right to proceed in the hiring process, but ultimately was not hired due to her performance on a physical agility test. The court rejected arguments that the ultimately legitimate decision not to hire her precluded her from being considered a "prevailing party" for purposes of an award of attorneys' fees; the court observed that "[d]efendant's argument ignores the fact that Bernard sought and won the right to be judged on nondiscriminatory job criteria. This achievement alone establishes her as a prevailing party." 567 F.Supp. at 1225.

While the parties argue at length over whether the holding applies only to the definition of a "prevailing party" for purposes of attorneys' fees or rather to grounds for judgment under Title VII, the dispute is irrelevant.

The opinion holds that the plaintiff prevailed, either for Title VII purposes or for attorneys' fees, because she established "the right to be *judged* on nondiscriminatory job criteria." (emphasis added) In the instant case, no applicant was ever judged as the plaintiff in *Hall* had been. Discriminatory devices were utilized to evaluate applicants for the SFFD, but no decisions regarding the allocation of employment opportunities were subsequently made pursuant to the discriminatory evaluations—unlike the *Hall* plaintiff, who was judged, rejected, and excluded from the hiring process on the basis of invalid selection criteria.

Plaintiff-intervenors alternatively cite the holding of *Giles v. Ireland*, 742 F.2d 1366 (11th Cir.1984), in support of their argument. *Giles* involved a "no promotion" policy at a state institution divided into three tiers of employment. Blacks constituted 66% of the lowest tier, 18% of the second tier, and 14% of the third tier. 742 F.2d at 1379. The policy prohibited promotions between the first and second tiers, but allowed promotions between the second and third tiers. *Id.* The court held that this policy, although neutral on its face, appeared to discriminatorily exclude blacks from promotion to the third tier by maintaining their underrepresentation in the pool of applicants in the second tier. The court further held that under *Connecticut v. Teal*, even "an equal impact on blacks and whites did not preclude the district court from finding a violation of title VII. The Supreme Court has held barriers to advancement violative of title VII, even where the result of such barriers is an appropriate racial balance." 742 F.2d at 1379. The court then held that the record before it was inadequate to determine the effect of the no-promotion policy on the advancement of blacks, and remanded the issue to the district court. 742 F.2d at 1380.

The *Giles* holding is simply not analogous to this action. By allowing promotional mobility among the tiers heav-

ily populated by whites, but not including the one tier populated predominantly by blacks, the institution in *Giles* awarded promotional benefits disproportionately to white employees. The hiring and promotional freeze attending the cancellation of the SFFD's employment examinations, given the low representation of blacks at all levels, has not had a similarly asymmetrical adverse impact—particularly when one considers that the hiring and promotional freeze itself was imposed to avert an exacerbation of the racial disparity already existent in the SFFD. It is impossible on this record to isolate specific minority individuals who have been discriminatorily burdened by the exam cancellation, as required under *Connecticut v. Teal* to establish a denial of employment opportunities violative of Title VII.[7]

B. *Perpetuation of Past Discrimination*

Plaintiff-intervenors argue alternatively that the City's cancellation of its hiring and promotional examinations has violated Title VII by perpetuating past discrimination. Plaintiffs suggest that the cancellation of the exams demonstrates the continuing failure of the SFFD to correct its past abuses, and represents the freeze of an unacceptable status quo. Plaintiffs again cite the holding of the court in *Giles v. Ireland*, 742 F.2d at 1366, in support of this proposition. The *Giles* court stated that "the district court failed to consider whether the failure to promote, although it may not itself have had an overt adverse impact, perpetuated the effects of

[7] This conclusion does not bar a subsequent finding at trial that the City discriminatorily denied employment opportunities to identifiable minorities and women. Such a finding, though, would require the court to consider the examinations' administration and cancellation in the context of plaintiff-intervenors' much broader pattern and practice allegations. On a record limited only to the bare fact that the City administered and then cancelled, prior to hiring, certain invalid examinations, the court as a matter of law cannot find a discriminatory denial of individual employment opportunities violative of Title VII.

past discrimination." 742 F.2d at 1378. The court observed how prior discrimination had concentrated blacks at the bottom of the employment hierarchy, and how the no-promotion policy possibly operated to "freeze the effects of past discrimination" in a manner potentially violative of Title VII. 742 F.2d at 1380-81. As the court stated in *N.A.A.C.P. v. City of Evergreen*, 693 F.2d 1367, 1370 (11th Cir. 1982), *reh'g denied*, 698 F.2d 1238 (11th Cir. 1983), "even absent the threat of future discriminatory behavior, the courts have a duty to correct and eliminate the present effects of past discrimination."

The undisputed factual record before the court contains a litany of failures on the part of the City to establish valid employment procedures for the nondiscriminatory hiring and promotion of minorities and women, attributed by the *WACO* court to the SFFD's "stubborn insistence" on alternatives which the court had previously and unequivocably declared unacceptable.[8] 369 F.Supp. at 80. The court's 1973 order of affirmative relief, following the City's fourth failure to establish the validity of its H2 firefighter exam, dispositively established an historical record of prior discrimination on the part of the SFFD.[9] While not finally resolved, the state court challenge to the 1978 H20 promotional procedure quite possibly will result in a similar finding of discrimina-

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[8] Significantly, the *WACO* court directed its comments in part to employment procedures developed by the City after the extension of Title VII to municipalities in 1972.

[9] While the City in the *WACO* consent decree refused to admit to any prior discriminatory behavior nor concede "the legal and constitutional validity of the court's findings of discrimination," *WACO v. Alioto*, No. C-70-1335-WTS, consent decree at 3 (N.D.Cal. May 18, 1977), its boilerplate disclaimer obviously does not restrain this court from considering the record of discrimination established in that action. *See EEOC v. American Tel. & Tel. Co.*, 419 F.Supp. 1022, 1038-1040 (E.D.Pa.1976), *aff'd*, 556 F.2d 167 (3d Cir.1977), *cert. denied*, 438 U.S. 915, 98 S.Ct. 3145, 57 L.Ed.2d 1161 (1978); *Vulcan Pioneers, Inc. v. New Jersey Dept. of Civil Service*, 588 F.Supp. 727, 731 n. 5 (D.N.J.1984).

tion, given the tenor of recent opinions issued in that matter.

Prior to determining whether the City's administration and subsequent cancellation of the H2, H4, and H20 examinations unlawfully froze the effects of the SFFD's past record of discrimination, the court must establish what those effects were and whether they remained uncorrected after the termination of the *WACO* consent decree. *Cf. Guardians Ass'n of New York City v. Civil Service Comm'n*, 630 F.2d 79, 109 (2d Cir. 1980), *cert. denied*, 452 U.S. 940, 101 S.Ct. 3083, 69 L.Ed.2d 954 (1981). While the *WACO* court ordered affirmative relief to correct the effects of past discrimination, and while a number of minorities were hired pursuant to the court's supervision, this court cannot presume as a matter of law that no effects of the earlier discrimination remain. As this court stated in its order granting preliminary injunctive relief, "[t]he court is certainly free to determine whether the stated purpose [of the consent decree] 'to foster equal employment and promotional opportunity within the San Francisco Fire Department to which defendants are expressly committed, [and] to correct imbalance between the racial and ethnic composition of said department and the work force of the City and County of San Francisco . . .' has been fulfilled. . . ." February 12, 1986 Order at 8-9. The necessity of this inquiry is made more compelling by the fact that minorities remain significantly underrepresented in the SFFD, which has yet to hire a woman firefighter.[10]

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[10] As of June 1, 1985, there were 79 blacks (5.7%), 35 Asians (2.5%), and 88 Hispanics (6.4%) in a force of 1380 uniformed individuals. Department of Labor census data indicates that black, Asian, and Hispanic men respectively comprise 9.6%, 19.3%, and 11.2% of the male civilian labor force in San Francisco. Thus minority men account for approximately 40% of the male labor force in San Francisco, but comprise only 14.6% of the City's firefighting force. Women account for 45% of the total labor force in the City.

Nonetheless, the court is hesitant on the rather barren record of undisputed facts to attempt to identify the effects of past discrimination which possibly have lingered within the SFFD beyond the expiration of the *WACO* consent decree. This determination must be left to trial, when the court will have before it the full range of relevant evidence regarding the SFFD's satisfaction of the *WACO* consent decree's objectives.[11] In light of this resolution, the court need not reach the subsequent question of whether the administration and cancellation of the examinations impermissibly perpetuated the effects of prior discrimination in a manner violative of Title VII. The court observes, though, that this determination is also more appropriately left to trial, when the court can consider the H2, H4, and H20 examination procedures in the broader context of plaintiff-intervenors' pattern and practice allegations.[12]

C. *Cessation of Illegal Activity and Mootness*

Both plaintiff-intervenors and the United States argue that cancellation of the examinations prior to hiring does not deny the court the authority to enter judgment and grant injunctive relief, given the holding of *United States v. W.T. Grant*, 345 U.S. 629, 632-33, 73 S.Ct. 894, 897-98, 97 L.Ed. 1303 (1953) and *County of Los Angeles v. Davis*, 440 U.S. at 631, 99 S.Ct. at 1383. *Grant* and *Davis* stand for the proposition that voluntary cessation of allegedly illegal activity will not moot an action absent a heavily burdensome showing that " 'there is no reasonable expectation that the wrong will be repeated,' " 345 U.S. at 633, 73 S.Ct. at 897, quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 448 (2d Cir. 1945), and that "interim relief or events have completely

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[11] For example, no evidence regarding the SFFD's minority recruitment program, bearing directly on the question of past discrimination and its rectification, is to be found in the current record of undisputed facts.

[12] *See* note 7, *supra*.

and irrevocably eradicated the effects of the alleged violation." 440 U.S. at 631, 99 S.Ct. at 1383. Only if both conditions are met will an action be considered moot. *Id.*[13]

Certain of the defendants suggest as a threshold consideration that since the City voluntarily withdrew the examinations prior to any use for hiring purposes, the absence of a discriminatory employment result must preclude any finding of illegal activity and thus bar the award of relief. *See, e.g.,* Response of Defendant-Intervenors Local 798 to Proposed Interim Relief at 12, 15 ("Compliance relief is out of the question because . . . the examination has not . . . been used to make any appointments. . . ." This analysis completely ignores the fundamental distinction between damage relief and injunctive relief. Unlike an award of damages, ordered to redress some concrete injury,

> [t]he sole function of an action for injunction is to forestall future violations. It is so unrelated to punishment or reparations for those past that its pendency or decision does not prevent concurrent or later remedy for past violations by indictment or action for damages by those injured. All it takes to make the cause of action for relief by injunction is

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[13] The City has conceded its liability under this theory. In its response to plaintiffs' motions for summary judgment, the City states that it "recognizes the Court's inherent power to grant the specific type of injunctive relief requested by the Justice Department under the authority cited in *County of Los Angeles v. Davis* (1979) 440 US 625 [99 S.Ct. 1379, 59 L.Ed.2d 642]." Response of Defendant City to Davis Motion for Partial Summary Judgment at 4-5. Nonetheless, because the City apparently has retracted this admission of liability in its last submission, the court will look beyond the City's waivering concession and independently determine its exposure to the entry of judgment under *Davis*. (The City states in its submission to the court dated January 22, 1987, that "the Court should deny the pending motions for summary judgment and grant interim relief [by modifying the existing preliminary injunction] . . . .")

> a real threat of future violation or a contemporary violation of a nature likely to continue or recur.

United States v. Oregon State Medical Society, 343 U.S. 326, 333, 72 S.Ct. 690, 695, 96 L.Ed. 978 (1952). Here the City took every step required to violate the law but the last: it developed and administered unvalidated employment examinations and then tenaciously defended the examinations over the course of two years of pretrial litigation in an attempt to utilize their results for hiring and promotional purposes. In the case of the 1982 H2 appointment list, the City's intent to imminently consummate its concededly discriminatory employment procedure was thwarted only by order of this court preliminarily enjoining the use of the list for any hiring purpose.

Now, on the eve of trial, the City has decided to abandon its long and arduous defense of the H2, H4, and H20 examinations. While this act, by barring the possibility of discriminatory hiring from the examinations may have averted the infliction of compensable injuries on specific minority and female applicants (a determination that can only be made at trial, in the context of plaintiff-intervenors' broader allegations), the cancellation of the examinations in no way suggests that the City has now immunized itself from the future use of discriminatory hiring practices. Of course, the opposite is true: the City has only deepened cause for concern by conceding that it has failed once again to develop valid employment procedures for hiring and promotions within the Fire Department, thus adding yet another chapter to an unenviable record of behavior reaching back nearly two decades. For the court to ignore the SFFD's consistent and ongoing inability to utilize nondiscriminatory employment procedures, and to decline to enter judgment and award injunctive relief to assure that this sorry history will finally come to an end, would be inexcusable.[14]

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[14] The appropriateness of injunctive relief at this point is particularly compelling in light of the City's plans to immediately de-

The City's behavior is clearly actionable for injunctive relief. The only remaining question, then, is whether its voluntary cessation has mooted the action under the heavily burdensome two-part test in *Davis*. First, in light of this history it cannot "be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur. . . ." (citation omitted) 440 U.S. at 631, 99 S.Ct. at 1383. In *Davis*, the challenged employment procedure—an emergency hiring proposal abandoned prior to both its implementation and the filing of the lawsuit—had been superseded at the time of the Court's review by an acceptable procedure which for five years had drawn over 50% of the fire department's new recruits from minority groups. 440 U.S. at 632-33, 99 S.Ct. at 1383-84. The development and long-term implementation of a new and acceptable hiring procedure, coupled with the defendant's willingness to voluntarily abandon the suspect procedure itself prior to legal challenge, both suggested in *Davis* that there was no possibility that the violation would recur. Here, the City has not developed any alternative hiring procedure, nor has it evinced a willingness to voluntarily relinquish suspect procedures until long and bitter litigation has all but foretold an ultimate finding of liability. *See, e.g.*, Order Granting Preliminary Injunction dated February 13, 1986 at 11. The recently imposed wisdom of a new City Attorney, who has categorically declared the exams invalid, does not persuade the court that the long-entrenched practices of the City, the Fire Department and the Civil Service Commission will be completely eradicated, never to resurface. Obviously the court cannot conclude on these facts that by cancelling the exams on the eve of trial, the City has carried its heavy burden

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velop a new series of hiring and promotional examinations. Given the City's historical inability to develop valid employment procedures, the possibility of future violations must be precluded by assuring that the City's new examinations finally satisfy the requirements of Title VII.

and demonstrated that there is no possibility that it will once again employ invalid and unacceptable employment procedures.

Nor has the City satisfied the second prong of the *Davis* mootness test, which requires that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." 440 U.S. at 631, 99 S.Ct. at 1383. The City's cancellation of the appointment lists prior to hiring has precluded the most obvious effect of the violation: explicitly discriminatory hiring resulting in the exclusion of specific minority applicants from employment. *See* 440 U.S. at 633, 99 S.Ct. at 1384. However, the City is left with a significantly imbalanced force having few minorities and no women, unlike in *Davis* where the department's new hiring had cured the discriminatory impact of past practices.

The Court in *Davis* identified additional types of discriminatory effects which the court at this point cannot conclude have been eradicated. These include the possibility that minority job applicants were deterred from applying for employment within the SFFD "as a result of the proposed application of the examination," and the possibility that the cancelled exams "reflected a racial animus that might have tainted other employment practices." 440 U.S. at 633, 99 S.Ct. at 1384. Allegations, at this juncture unproven, have been made by plaintiff-intervenors that the examination process had such effects. The burden of proof, while obviously falling with the plaintiffs at trial, falls on the City at this point to show that the injurious effects resulting from the administration and cancellation of the exams have been "completely and irrevocably eradicated." *Id.* at 631 99 S.Ct. at 1383. That burden has not been satisfied.

Accordingly, this dispute is not moot, and plaintiffs are entitled to partial summary judgment and injunctive relief to preclude the possibility that new entry-level and

promotional exams will once again fail to satisfy the requirements of the law.

III. APPROPRIATE RELIEF

Plaintiff-intervenors request only declaratory relief at this juncture, for reasons that are not at all clear. Their stated explanation is not particularly elucidating: "Plaintiff-intervenors' understanding of the law is that in these disparate impact cases, a second hearing is required for remedy purposes (*see, International Brotherhood of Teamsters v. United States of America*, 431 U.S. 324, 361-62, [97 S.Ct. 1843, 1867-68, 52 L.Ed.2d 396] (1978) [sic]), and therefore, they have not requested any specific relief other than a Declaratory Judgment." Plaintiff-Intervenors' Reply Memorandum at 3. *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), stands only for the proposition that "[w]hen the Government seeks individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief." 431 U.S. at 361, 97 S.Ct. at 1868. Obviously, the question of individual relief is not in issue at this point in the proceedings, given the absence of proven individual injuries.

The court at this juncture considers only the award of injunctive relief, of the nature requested by the United States, so as to assure the expeditious development of valid entry-level and promotional examinations, to preclude the reinstitution of the previous employment practices, and to outline the requirements of any interim hiring that the City may determine is required for the public safety until new, lawful employment procedures are instituted. Given the factual record before the court, the injunction at this stage will not afford affirmative relief. This does not preclude plaintiff-intervenors from establishing at trial a record of discriminatory practices that

is sufficiently egregious and persistent to warrant affirmative race- or sex-conscious relief, thus justifying the modification of the relief herein granted. *Local 28 of the Sheet Metal Workers' Int'l. Ass'n v. E.E.O.C.*, — U.S. —, 106 S.Ct. 3019, 3034, 92 L.Ed.2d 344 (1986). At this point, though, the limited record of undisputed facts before the court does not support such a remedy.

In recognition of the possibility of an imminent "firefighting crisis" if H2 entry-level firefighter employment does not recommence,[15] the court additionally outlines the procedures that the City must follow if it chooses to engage in interim hiring to meet emergency staffing needs. *See Guardians Ass'n of New York City v. Civil Service Comm'n*, 630 F.2d at 113. The court is satisfied that a critical need is shown. Although it appears that at this very moment there is not a pending crisis, it is clear that some immediate preparations may be necessary to select new hirees, adequately train them and arrange their assignment and on-the-job supervision for imminently critical times.

The court faces a difficult dilemma insofar as any interim hiring for the H2 position must utilize the appointment lists (E-27 and E-27A) generated by the invalid 1982 H2 examination. As Judge Sarokin observes, "[h]aving concluded that the civil service exam unlawfully denied minorities fair [employment] opportunities, to now permit appointments from lists generated by these invalid exams would totally vitiate the court's ruling and its purpose." *United States v. New Jersey*, 658 F.Supp. 9, 11 (D.N.J.1986). Balanced against the fundamental illogic of allowing interim hiring to proceed on the basis of lists already declared invalid is the pressing need for additional firefighters to preserve the public safety. The

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[15] *See* January 22, 1987 Declaration of Emmet Condon, Chief of the SFFD, at 4.

court concludes that these competing considerations can be best reconciled by ordering that the City conduct all interim hiring on a provisional basis. Thus, prior to gaining a permanent appointment within the SFFD, all firefighters hired during the interim period will be required to pass all components of the new H2 employment procedure, once developed. The court is acutely cognizant of the burden that this arrangement will place on the men and women hired during the interim period; nonetheless, "[p]ermanent appointments may carry a stigma and pose morale and resentment problems . . ." which ultimately may be more burdensome than the provisions here outlined. *United States v. New Jersey*, *supra* at 7. In any event, the City regrettably has left the court few acceptable alternatives from which to choose.[16]

Finally, while the court does not order or require interim hiring, and outlines its provisions only to allow the City the freedom to conduct such hiring, if it so chooses, to avert a public safety crisis, the hiring must avoid any disparate impact. Therefore, any interim hiring conducted by the City pursuant to this order must reflect at a minimum the proportion of women and minorities in the applicant pool, insofar as such hiring is possible given the composition of lists E-27 and E-27A. *Guardians Ass'n of New York City v. Civil Service Comm'n*, 630 F.2d at 113.

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[16] The court allows this interim hiring procedure only because Chief Condon states that the public safety may soon be jeopardized without it. Absent such compelling circumstances, it would be far preferable to await the development of new examinations. Accordingly, since Chief Condon makes no mention of a critical need for H4 and H20 appointments within the Department, the court does not provide for interim H4 and H20 promotions. These must await the development of new and valid selection procedures, unless the City determines at a later date that the public safety in fact requires interim H4 and H20 appointments. In that case, the City may submit a proposed plan to the court for consideration.

ACCORDINGLY,

A. *Permanent Injunctive Relief*

1. Defendants are permanently enjoined from engaging in any act or practice that has the purpose or effect of unlawfully discriminating against any employee of, or any applicant for employment with, the San Francisco Fire Department because of such individual's race, sex, or national origin, and specifically from unlawfully discriminating at any time on the basis of race, sex, or national origin in hiring, promotion, upgrading, training, assignment, discharge, compensation, and terms and conditions or privileges of employment. Defendants shall take reasonable steps to assure that no member of the San Francisco Fire Department retaliates against any person because that person has opposed discriminatory policies or practices or because of that person's participation in or cooperation with the initiation, investigation or litigation of any charge of unlawful discrimination based on race, sex, or national origin, or the administration of this order.

2. The defendants shall not use any selection procedure that has an adverse impact on blacks, Hispanics, Asians, or women in hiring or promotion unless the procedure can be shown to be valid or otherwise justified by business necessity, all in accordance with Title VII and the provisions of the *Uniform Guidelines on Employee Selection Procedures*, 28 C.F.R. 50.14, or successor guidelines.

3. Defendants shall maintain a program of recruitment and training directed at increasing the number of qualified black, Hispanic, Asian, and female applicants for firefighter positions. This recruitment program shall include, but not be limited to:

(a) the use of media;

(b) developing and maintaining contacts with black, Hispanic, Asian, and women's community organizations

to inform their respective memberships of employment opportunities;

(c) active use of black, Hispanic, Asian, and female (upon hiring) uniformed personnel in recruitment activities;

(d) training programs and such other efforts as are necessary and appropriate to advise blacks, Hispanics, Asians, and women of employment opportunities as firefighters; and

(e) training programs that will assist blacks, Hispanics, Asians, and women to obtain the necessary skills to qualify for firefighter positions.

4. The selection procedures which were used in connection with the establishment of List E-27 and List E-27A had a significant adverse impact on blacks, Hispanics, Asians, and women, and have not been demonstrated by the City to be job-related. Accordingly, no appointments shall be made from List E-27 or List E-27A, and said Lists shall expire for all purposes other than their limited use for interim hiring, as outlined below, upon the entry of this order and approval by the court.

5. Defendants shall make no appointments to the position of H2 firefighter until this order has been fully complied with or leave of court is obtained pursuant to the terms set forth in paragraphs 15 through 20 below.

6. Defendants shall not adopt any eligibility list nor make any appointments on an acting, provisional or permanent basis to the ranks of fire inspector (H4) or fire lieutenant (H20) which are based in any way on the selection procedures developed and administered pursuant to the 1984 job announcement for those ranks.

7. Pursuant to agreement of the parties, as set forth in the Joint Pretrial Statement filed August 15, 1986, resolution of any claims regarding relief for the 1978

lieutenant (H20) examination shall await final resolution of state litigation entitled *City and County of San Francisco v. Fair Employment and Hous. Comm'n.*

8. Defendants shall develop selection procedures for the entry and promotional classifications within the SFFD which are consistent with Title VII and the *Uniform Guidelines*, and shall establish new entry-level firefighter and promotional eligibility lists based upon those procedures.

9. The City shall develop new selection procedures for the ranks of firefighter (H2), fire inspector (H4), and fire lieutenant (H20) which shall be job-related and comport with Title VII and the *Uniform Guidelines.* The City shall complete development and administration of the H2, H4, and H20 examinations as soon as possible, with development of the examinations by December 31, 1987, and with administration of the examinations no later than March 31, 1988. Within thirty (30) days after the entry of this order the City shall prepare and file with the court, with copies to counsel for all parties, a timetable setting forth a schedule for completing, as expeditiously as practicable, each phase of the preparation of the new selection procedures and for meetings between the City, the court and counsel for all parties to this action. Such meetings shall provide all counsel with the opportunity to provide input into the City's process for deciding among alternative approaches or formats that may be under consideration.

10. After filing of the proposed schedule with the court, the court, after consultation with all parties, will establish a final schedule for test development by the City which will provide for:

(a) an initial report to the court and all parties prior to administration of the selection procedures, which shall describe the proposed selection plan, all components of all examinations to be given, and the procedures to be used

for administration of the plan and its components. The report shall include a complete statement of the methods and procedures used to develop and validate all test components, including copies of all testing and validation data; and

(b) a report to the court and to all parties subsequent to the administration of each examination component, and upon the conclusion of the entire examination process, which shall describe the administration of and the proposed use of the examination, and which shall include an analysis of the relative performance of candidates by race, sex, and national origin, and the validity of the selection procedures. The reports required under this subparagraph shall be filed within fifteen (15) days of completion of each component.

11. Within thirty (30) days of submission of the City's initial report to the court, any party to this action may present to the court its objections and proposed modifications, if any, to any part of the selection procedures. If objection is made, the parties shall meet and attempt to agree on modifications to those procedures. If the parties are unable to reach agreement within thirty (30) days or such other time as may be agreed upon by the parties, the parties shall submit their respective positions to the court, and the court shall determine the modifications, if any, necessary to bring the selection procedures into compliance with the law.

12. Commencing within ninety (90) days of the date that this order is entered and semi-annually thereafter, the defendants shall file with the court, the United States, and counsel for plaintiff-intervenors a report disclosing the following information:

(a) current firefighter eligibility lists, showing the race, sex, and national origin of the candidates;

(b) summary information showing by race, sex, and national origin, the numbers of applicants who applied

for, took, and passed each component of the selection process administered during that reporting period;

(c) a listing of all uniformed Fire Department employees arranged by job title, race, sex, and national origin;

(d) a listing of all appointments (both initial and promotional) in uniformed positions made during the reporting period arranged by job title, race, sex, and national origin;

(e) a listing by name, race, sex, national origin, and job title of all persons terminated from a uniformed position with the Fire Department, noting the reason for that person's termination; and

(f) a listing by name, race, sex, national origin, and job title of all persons who voluntarily resigned from a uniformed position with the Fire Department, noting, if known, the reason for that person's resignation.

Each semi-annual report shall be accurate as of the first day of July and January of each year and shall be filed with the court, the United States and counsel for plaintiff-intervenors no later than August 1 and February 1 respectively. In addition, defendants shall furnish written reports to the United States and counsel for plaintiff-intervenors on matters pertaining to compliance with the order, upon written request.

13. During the time period that this order is in effect, the defendants shall retain all records relating to the recruitment, selection, appointment, promotion, training, evaluation, assignment, and discipline of persons for uniformed positions in the Fire Department, including:

(a) all applications, including applications for hire, transfer or promotion identified by race, sex, and national origin;

(b) examinations, evaluations or records of any nature showing the performance of firefighters on the job or at the training academy;

(c) all written communications between the defendants and applicants for employment, transfer, and promotion;

(d) all records relating to the implementation of the recruitment obligations of this order including a list of all organizations and/or schools that were contacted for recruitment purposes, showing the date and nature of the contact; and

(e) all records relating to the adverse impact and/or validity of selection procedures utilized to fill entry-level or above entry-level firefighter vacancies.

The United States and counsel for plaintiff-intervenors shall have the right to inspect and/or copy for their use in connection with enforcement of this order any or all of the records described above, upon reasonable notice to the defendants. The United States and counsel for plaintiff-intervenors may request inspection or copying of other records for good cause shown upon application to the court.

14. This order shall continue in full force and effect for a period of five years. At any time after such five-year period, defendants may, upon forty-five (45) days notice to the United States and plaintiff-intervenors, file an order of dismissal with the court, which shall be entered unless the United States or plaintiff-intervenors, upon motion served and filed before the proposed date of entry of the order of dismissal, and after a hearing by the court, shows good cause for continuation of this order in whole or in part. During the effective period of this order, the court shall have continuing jurisdiction for the purpose of effectuating its purposes and terms, and providing for its enforcement.

B. *Provisional Interim Hiring*

Pending the development of a new entry-level examination, the following provisional appointment of H2 firefighters may be made if the defendants determine that such hiring is necessary to avert a firefighting crisis:

15. Fifty-four (54) persons, or as many persons as may fill two classes at the Fire College, may be offered positions in the SFFD Fire College to train for positions as provisional H2 Firefighters. These persons shall be selected from eligibility lists E-27 and E-27A. The defendants must minimally assure that those offered positions reflect the minority and female proportions of the applicant pool, unless lists E-27 and E-27A include insufficient minorities and women to do so. Any additional interim hiring beyond the 54 positions here authorized must be requested by application to the court.

16. All individuals appointed to the rank of H2 firefighter pursuant to this interim procedure shall serve provisionally until the administration of a new H2 employment testing procedure. At that time, all provisional H2 firefighters must obtain a passing score on all components of the new employment procedure to gain permanent firefighter employment status. All provisional H2 firefighters shall be assured the opportunity to take each component of the new employment testing procedure, and shall be assured permanent employment if they obtain passing scores.

17. If the defendants choose to hire H2 firefighters on an interim basis, the court will appoint a monitor, at the expense of the defendants and paid at a reasonable rate as set by the court, who will be responsible for apprising the court on a monthly basis of the defendants' compliance with the terms of this order as it pertains to interim hiring, including any and all allegations of discrimination against the new recruits on the basis of race, sex, or national origin. The court will more specifically set forth

the selection process and duties of the monitor upon notification by the defendants of their intention to commence interim hiring. Such notification shall be made to the court and counsel for all parties without delay and shall be at least thirty (30) days in advance of any hiring efforts.

(a) As soon as practicable after notification to the court, the defendants shall meet with plaintiff-intervenors and attempt to agree on the name of an individual to be appointed monitor. If they cannot agree on one name, they shall attempt to agree on a list of three names. If they cannot so agree, defendants and plaintiff-intervenors shall submit separate lists each containing the names of three individuals proposed for the position of monitor. The name or names of the proposed individuals and their respective qualifications shall be submitted to the court by defendants and plaintiffs-intervenors either jointly or separately no later than fifteen (15) days after the defendants notify the court and counsel that they intend to conduct interim H2 hiring.

(b) No appointments to positions in the Fire College may be made until the monitor has been appointed by the court.

(c) The monitor shall receive weekly reports from the defendants on the status of all recruits in training. Before any member of the classes appointed pursuant to this order shall be terminated from the Fire College, the monitor shall be informed of the reasons for the proposed termination. The termination shall not take effect until the monitor approves the decision.

18. Along with defendants' notification to the court of their intention to commence interim hiring, the defendants shall submit to the court and counsel for all parties a proposed plan including at least the following:

(a) the conduct of background and medical investigations, and the determination of whether potential recruits

on lists E-27 and E-27A remain currently qualified for appointment to the Fire College;

(b) the selection and training of Fire College instructors;

(c) the subject matter and structure of the provisional firefighter training program, including but not limited to training on sexual and racial harassment and the feasibility of implementing a "buddy system" whereby each Fire College recruit is assigned a volunteer buddy from the uniformed ranks of the SFFD;

(d) the provision of appropriate equipment for women recruits; and

(e) the assignment of women firefighters, upon graduation from the Fire College, to SFFD stations.

If any party objects to any aspect of the defendants' plan, such objection shall be filed within fifteen (15) days after receipt of the plan. The court will conduct its hearing thirty (30) days after receipt of the plan. No hiring or hiring efforts shall occur until the court has approved the plan.

19. If, after diligent recruitment efforts by the defendants and plaintiff-intervenors, insufficient applicants from lists E-27 and E-27A accept positions as provisional firefighters to fill two classes of the Fire College, the court, upon application by defendants, will reconsider the requirement that all H2 firefighter hiring during the interim period be conducted on a provisional basis.

20. Any plan for interim hiring shall be submitted and, if approved, effectuated substantially in advance of the completion and administration of the validated tests provided for above. Interim hiring will not be permitted on the eve of permanent hiring.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-1905

FONTAINE DAVIS, ERIC H. WASHINGTON; JERILYN NORTH; ROBERT L. DEMMONS; JIMMIE BRADEN; AUDRY LEE; EARLY DAVIS; BRANDI SWANSON; SUSAN MOOREHEAD; ANNE YOUNG; MARY M. CARDER; THERESA RODIGOU; KATHLEEN J. BRADSHAW; PATRICIA MURRAY; INTERNATIONAL ASSOCIATION OF BLACK FIREFIGHTERS-SAN FRANCISCO CHAPTER; UNITED STATES OF AMERICA,
Plaintiffs-Appellees,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, *et al.*;
Defendant-Appellee,

JOHN W. FLAHERTY; EDWARD E. MURPHY; WILLIAM M. SHAUGHNESSY; ALFRED E. SMYTH;
Respondents-Appellants,

SAN FRANCISCO FIREFIGHTERS, LOCAL 798,
Defendant-Intervenor-Appellant.

No. 88-2735

UNITED STATES OF AMERICA,
Plaintiff,

and

FONTAINE DAVIS, *et al.*,
Plaintiffs in Intervention/
Appellees,

vs.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendant-Appellee,

SAN FRANCISCO FIRE FIGHTERS, LOCAL 798,
Defendant in Intervention/
Appellant.

FONTAINE DAVIS, *et al.*,
Plaintiffs-Appellees,

vs.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendants-Appellees,

vs.

SAN FRANCISCO FIREFIGHTERS, LOCAL 798,
Defendant in Intervention/
Appellant.

No. 88-2884

UNITED STATES OF AMERICA,
Plaintiff,

and

FONTAINE DAVIS, *et al.*,
Plaintiffs in Intervention/
Appellees,

vs.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendant-Appellee,

SAN FRANCISCO FIREFIGHTERS, LOCAL 798,
Defendant in Intervention/
Appellant.

FONTAINE DAVIS, *et al.*,
Plaintiffs-Appellees,

vs.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendants-Appellees,

vs.

SAN FRANCISCO FIREFIGHTERS, LOCAL 798,
Defendant in Intervention/
Appellant.

No. 88-15473

UNITED STATES OF AMERICA,
Plaintiff,

and

FONTAINE DAVIS, *et al.*,
Plaintiffs in Intervention/Appellees,

vs.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendant-Appellee,

SAN FRANCISCO FIRE FIGHTERS, LOCAL 798,
Defendant-Intervenor-Appellant.

FONTAINE DAVIS, *et al.*,
Plaintiffs-Appellees,

vs.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendants-Appellees,

vs.

SAN FRANCISCO FIREFIGHTERS, LOCAL 798,
Defendant in Intervention/Appellant.

No. 88-15474

UNITED STATES OF AMERICA,
Plaintiff,

and

FONTAINE DAVIS, *et al.*,
Plaintiffs in Intervention/
Appellees,

vs.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendant-Appellee,

vs.

SAN FRANCISCO FIRE FIGHTERS LOCAL 798,
Defendant-Intervenor-
Appellant.

FONTAINE DAVIS,
Plaintiffs-Appellees,

vs.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendants-Appellees,

vs.

SAN FRANCISCO FIRE FIGHTERS LOCAL 798,
Defendant in Intervention/
Appellant.

D.C. No. CV-84-1100-MHP

ORDER

[Filed May 9, 1990]

Before: FARRIS, THOMPSON and TROTT, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C-84-7089-MHP

UNITED STATES OF AMERICA,
Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendants.

Civil Action No. C-84-1100 MHP

FONTAINE DAVIS, *et al.*,
Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendants.

PLAINIFF UNITED STATES' OBJECTION TO AND SUGGESTION FOR CLARIFICATION OF PROPOSED CONSENT DECREE

[Filed Dec. 10, 1987]

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Wygant v. Jackson Bd. of Education, —— U.S. ——, 106 S.Ct. 1842 (1986) .....

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C-84-7089-MHP

UNITED STATES OF AMERICA,
Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendants.

Civil Action No. C-84-1100 MHP

FONTAINE DAVIS, *et al.*,
Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendants.

PLAINTIFF UNITED STATES' OBJECTION TO AND SUGGESTION FOR CLARIFICATION OF PROPOSED CONSENT DECREE

Issue Presented

Whether the consent decree tendered to the Court on November 12, 1987, by the private plaintiffs and the defendant City and County of San Francisco is reasonable, lawful and constitutional.

Introduction

Plaintiff United States herewith submits its position with respect to the proposed consent decree which was presented to the Court on November 12, 1987, and which is intended to resolve all issues in this litigation between defendants City and County of San Francisco, *et al.* and plaintiff-intervenors in *United States* v. *City and County of San Francisco*, C-84-7089-MHP, and plaintiffs in *Davis, et al.* v. *City and County of San Francisco, et al.* C-84-1100-MHP.

Plaintiff United States objects [1] to the proposed decree on two grounds: In several respects, the proposed decree radically modifies the Court's prior order of February 26, 1987, providing for race-specific steps which are not narrowly tailored to remedy the violations found and/or alleged unlawful activities of the City, and which thereby unconstitutionally and unlawfully infringe upon the rights of innocent third parties. See *Wygant* v. *Jackson Bd. of Education*, —— U.S. ——, 106 S. Ct. 1842, 1846 (1986). In addition, without the agreement of the United States, the proposed decree eliminates those provisions of the

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[1] The standing of the United States—the original plaintiff in this action—to object to provisions of this proposed decree is clear. As noted above in the text, the proposed consent decree substantially modifies the obligations of the City under the February 26th Order, for example providing for use of the unlawful 1984 lieutenant examination, and eliminating rights of the United States under that Order with respect to the development of new examinations.

While plaintiff United States has represented to the Court that it would seek no further relief under its complaint, beyond that provided in the Court's order of February 26, 1987, except with respect to the 1978 Fire Lieutenant (H-20) examination, we have also indicated to the Court and the other parties that we reserved our right to object or otherwise comment with respect to other relief, if any, ultimately ordered in this litigation, in particular with respect to its effect on the relief obtained by the United States in the February 26, 1987 Order. See Status Report filed by all parties, April 9, 1987 (copy attached).

prior court order obtained by the United States which required the City to consult with the United States and other parties in the development of new, lawful selection procedures, limits to seven days the time within which the United States would be able to object to any aspect of a future selection procedure, and restricts any hearing on such an objection to a proceeding before a state administrative law judge, with no right of appeal to this Court. See proposed decree, pars. 4 and 15, and compare Exhibit A to the decree, par. 9 to the Order of February 26, 1987, par. 9. Absent our agreement, these parties cannot so bind the United States in this action. See, *e.g.*, *United States* v. *Ward Baking Co.*, 376 U.S. 327 (1964).

Plaintiff also requests clarification of other provisions of the proposed decree, so that the intent of the parties will be clear to other parties to this litigation and to the persons whose careers would be affected by the decree over the next several years.

Statement of Facts

The factual background of the SFFD and the procedural history of the litigation in this suit and prior actions is straight forward and largely uncontroverted.

A. *Firefighter Selection*

The San Francisco Fire Department had approximately 1,380 uniformed employees in 1985. Of these, 79 (5.7%) were black, 88 (6.4%) were Hispanic and 35 (2.5%) were Asian.[2] The SFFD had never employed a female firefighter at that time. The civilian labor force in San Francisco as of the 1980 Census, was approximately 10% black, 11% Hispanic and 19% Asian (Proposed decree, par. 9, p. 11.

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[2] Joint Stipulation of the Parties, filed August 15, 1986 (hereafter Jt. Stip.), pars. 14-17.

Until 1972, virtually all of the sworn personnel of the SFFD were white.[3] In 1970, a private suit (hereinafter the "*WACO*" litigation) was brought in federal district court alleging discrimination in employment against blacks and Hispanics. The thrust of the *WACO* suit was against the use of a multiple-choice written test in the selection procedure for initial hire. See *Waco* v. *Alioto*, 330 F. Supp. 536 (N.D. Cal. 1971). The court in *WACO* issued a preliminary injunction in 1971 against the selection procedure then used by the City. *WACO* v. *Alioto*, 340 F. Supp. 1351 (N.D. Cal. 1972). Under court order, the City administered a new examination in 1973. When the City continued to be unable to present substantial evidence of the validity of the new selection procedure, the court ordered the City to hire one minority for each white from among those who passed the 1973 examination. *WACO* v. *Alioto*, 369 F.Supp. 77 (N.D. Cal. 1973). Once all minorities on that eligible list (List E-25) had been offered appointments, the City was permitted to and did make offers of appointment to all other persons on that list, *i.e.*, the court-ordered one-for-one preference affected the sequence of appointment from List E-25, but all persons on that list were offered appointment. Joint Stipulation, par. 37.

In 1976, the City, pursuant to a consent decree approved by the court and entered in the *WACO* litigation, used the same written test as part of the selection process for the next firefighter examination (List E-26). See *WACO* consent decree, Section VI(1) (attached to Jt. Stipulation). For the first time, women were also eligible to apply for the firefighter position. An objection by the *WACO* plaintiffs to the results of that selection procedure with respect to minority applicants was rejected by the

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[3] There were five black employees in 1972. While no statistics were available for that period regarding Asians and Hispanics, the current number of such employees, and the hiring since 1972 suggest strongly that there were relatively few Hispanics and almost no Asians employed in the SFFD in 1972. See Joint Stipulations, pars. 14-17, 23, 27-31.

court in 1978, which held that the City had complied fully with the *WACO* decree. *WACO* v. *Alioto*, No. C-70-1335-WTS (June 9, 1978) (copy attached). See also *Davis* v. *City & County of San Francisco*, C-84-1100 MHP, Memorandum Decision, pp. 2-3 (Nov. 5, 1984) (copy attached) (The [WACO] court specifically found that defendants acted in good faith and without any purpose of defeating the goals stated in the consent decree . . . .").

The City hired firefighters from 1972 until this litigation on the basis of lists E-25 and E-26 (which, as discussed above, were under court supervision) as well as through a voluntarily adopted, federally-funded program for the disadvantaged (List P-1). The total hiring in the period 1972-1984 was as follows (Jt. Stip. pars. 27-31):

	W	B	H	A	Other
P-1	1	15	2	1	2
E-25	329	45	37	13	1
E-26	224	28	24	15	2
Total	554(75.2%)	88(11.9%)	63(8.5%)	29(3.9%)	5(0.7%)

These hiring figures are comparable to the City labor force for blacks and Hispanics, but below the applicant flow for those groups for the E-26 examination. The hire figures for Asians are substantially below both labor force and applicant flow.[4]

B. *Promotional Selection*

The fire department supervisory structure in the area of fire suppression proceeds from firefighter through the supervisory ranks of lieutenant, captain, battalion chief, assistant chief, deputy chief, and chief (Jt. Stip., par. 50). Of the 278 persons currently holding permanent appointments in supervisory ranks, 4 (1.4%) are black,

[4] In 1976, the applicant flow for the firefighter examination was 16.6% black, 13.6% Hispanic and 8.5% Asian. Jt. Stip. par. 40.

development of future lawful examinations, and includes a series of race-specific steps for hiring and promotion.

The proposal establishes interim and long-term numerical goals for the hiring of minorities and women, which appear to relate to the labor force and the City's past experience in recruitment of minorities, and establishes interim promotion goals for each promotional rank based on the available applicant pool. Proposed decree, para. 9.

The proposal also establishes a detailed schedule of examinations and provides for the override of City Charter requirements where deemed appropriate in the development and administration of the new selection procedures, and of State law provisions regarding residency. Pars. 3, 5, 13-15.

Finally, the proposal provides for the appointment to the rank of lieutenant of six named black firefighters who were deemed victims of the unlawful 1978 lieutenant examination (Par. 11)[6] and the appoinment of twenty-seven additional minority firefighters to lieutenant, as a measure to remedy an existing imbalance between the proportion of minorities on the SFFD and their proportion in the supervisory ranks (Par. 16). These persons are to be appointed based on their performance on the unlawful 1984 lieutenant examination. That paragraph further permits up to forty-eight additional appointments from that list, with 25% of those also to go to minorities.[7] The eighty-one appointments contemplated by the proposed decree would fill all existing vacancies in the rank of fire lieutenant.[8]

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[6] These six persons would also receive back pay and seniority and are eligible to take a make-up captain examination, by which they could be slotted into the current captain eligible list. Proposed decree, par. 11.

[7] The applicant pool for the 1984 examination was approximately 23% minority. Declaration of Gerald George, par. 2 & 3.

[8] The language of the proposed decree is only permissive with respect to making up to forty-eight appointments. However, the City

In addition, with respect to the development of future selection procedures, the decree eliminates the requirement of the February 26th Order that the City consult with the United States and defendant-intervenor Local 798. The decree also places significant restrictions on the ability of the United States to object to any future examination, including a requirement that such objections be heard only before a state administrative law judge. See Proposed Decree, para. 15(c).

DISCUSSION

This Court, in approving a consent decree, is required to assess the agreement to ensure that it is reasonable, lawful and constitutional. The Supreme Court, in a series of opinions over the past several terms, has set forth the standards by which the courts are to evaluate the lawfulness and constitionality of race preferential treatment in hiring and promotion by public and private employers. The thrust of those opinions has been that any such activity by a public employer is to be scrutinized closely to ensure that the race conscious action serves a compelling governmental interest, and that the action is narrowly tailored to serve that interest, so that the rights of innocent third parties are not unfairly, or unnecessarily trammeled. *Wygant* v. *Jackson Bd. of Education*, —— U.S. ——, 106 S.Ct. 1842, 1846 (1986). While the Supreme Court has approved court decrees with racial preferences where the employer has displayed a long and egregious history of discrimination,[9] the Court has cautioned that less intrusive remedies should be con-

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has indicated it has such vacancies and intends to make all of the appointments. See letter of November 12, 1987 attached to and incorporated into the proposed decree.

[9] *Local 28, Sheet Metal Workers* v. *EEOC*, —— U.S. ——, 106 S.Ct. 3019 (1986); *United States* v. *Paradise*, —— U.S. ——, 55 U.S.L.W. 4211 (U.S. Feb. 25, 1987).

sidered, *Wygant*, *supra* at 1852, and that such preferences are not to be the normal relief in employment discrimination suits. *Local 28, Sheet Metal Workers* v. *EEOC*, —— U.S. ——, 106 S.Ct. 3019, 3050 (1986) ("In particular, the court should exercise its discretion with an eye toward Congress' concern that race-conscious affirmative remedies not be invoked simply to create a racially balanced work force. In the majority of Title VII cases, the court will not have to impose affirmative action as a remedy for past discrimination but need only order the employer or union to cease engaging in discriminatory practices and award make-whole relief to individuals victimized by those practices."). See also *Catlett* v. *Missouri Highway Comm'n*, 828 F.2d 1260 (8th Cir. 1987).

The proposed decree contains several provisions which contravene these standards.

A. *Lieutenant Appointments*

The proposed consent decree provides for specific racial preferences in the form of promotion to the rank of lieutenant. These preferences are stated to be remedial in nature: the first, calling for the promotion of six named black firefighters with back pay and seniority, is intended to remedy the discriminatory adverse impact on blacks resulting from the 1978 lieutenant examination. Decree, par. 11. A second, permitting the appointment of forty-eight persons to the rank of lieutenant based on the unlawful 1984 lieutenant examination, is intended to permit use of that eligible list in a manner which would not have adverse impact on minority applicants. The third, calling for twenty-seven additional minority appointments to the rank of lieutenant, uses the results of that 1984 examination to identify the appointees, but appears to be based solely on a desire to remedy the imbalance between the proportion of minority supervisors and the proportion of minorities in the SFFD as a whole.

The first preference, based on the 1978 examination, has a clear and appropriate remedial purpose. While we would prefer a more appropriate basis for determination of the identity of those persons who should have been promoted on the basis of that unlawful examination, under the circumstances here we will not object to the method apparently chosen by the parties, *i.e.*, the appointment of the next six blacks in order of score to compensate for the adverse impact of prior appointments from an unlawful examination. However, the remaining appointments, made from the 1984 eligible list, are not in any sense "narrowly tailored" to remedy past discrimination.

The decree proposes to make twenty-seven minority appointments to redress the underrepresentation of minorities in supervisory ranks of the SFFD. See Memorandum of November 12, 1987 of Dan Siegel, counsel for City (copy attached).[10] The term "redress" suggests that this "underrepresentation" is the result of unlawful discrimination in promotions by the SFFD. To the extent that such an imbalance in fact exists, however, it is to a substantial degree the inevitable result of the fact that the great majority of the black, Hispanic and Asian firefighters have been appointed to the SFFD only since 1974. Supervisory promotions for which they would have been eligible have been made only on the basis of the 1978 lieutenant examination. None of the persons hired

[10] As a practical matter, the resulting promotions go beyond remedying any "underrepresentations" by actually placing a higher proportion of minorities than whites in promotive positions. The current sworn force, excluding the forty-eight persons hired within the past three months, is approximately 1,297 persons, including 202 minorities (15.6%). There are currently 278 personnel holding permanent supervisory appointments, of whom 18 (6.5%) are minorities. After the appointments under paragraphs 11 and 16, there will be 359 supervisory personnel, including 63 (17.6%) minorities. Putting all other factors aside, this is seven more minorities than one would expect, given their proportion within the SFFD workforce.

subsequent to 1978, regardless of race, has yet to lose a promotion to a supervisory rank. More appropriately measured, a difference between minority and white proportions in the supervisory rank exists, but not to the striking degree asserted by the parties to the decree.[11]

More fundamentally, there is simply no necessity to embrace the race-specific use of an admittedly invalid selection procedure. In this situation, the appropriate remedy is instead that chosen by the Court in its February 26, 1987 injunction.[12] Under that order, the City is required to administer a new lieutenant examination by March 1988. The City has hired, with court approval, a panel of five noted experts, who have been working for several months to develop new selection procedures. The City has not indicated it cannot meet the March 1988 deadline or that it has any immediate need to promote to the rank of lieutenant. Accordingly, there is no legitimate reason for the City to ignore the efforts of its own experts, and to use a defective test to fill all of its current lieutenant vacancies in a race-specific manner.

The City should be directed to continue its on-going efforts to produce as expeditiously as possible valid selection procedures, so that now-existing and future promotional vacancies can be filled on the basis of legitimate job qualifications in a manner fair to all SFFD personnel, rather than on the basis of a concededly invalid selection procedure.

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[11] If post-1978 hires are excluded, the SFFD sworn force would be approximately 4.7% black, 5.9% Hispanic and 1.8% Asian. The supervisory ranks, including the six blacks appointed under paragraph 11, would be approximately 3.5% black and 5.0% Hispanic. Given the impact of seniority on promotions, these figures still overstate the extent to which the imbalance could represent the result of discrimination in the SFFD selection procedures.

[12] In its opinion, this Court indicated on a factual record not significantly different from the present record, that it could not order affirmative relief of the sort agreed to here. Memorandum and Order of February 26, 1987, at p. 29.

B. *Disqualified Lieutenant Applicants*

The proposed decree provides that persons who have been found by the Court to have violated one of several enumerated civil rights statutes or the revenue sharing statute,[13] shall not be promoted to the rank of lieutenant under the terms of paragraph 11. The letter of the City attached to the decree provides the City's interpretation as to the manner in which the Court would make such a finding. However, it seems clear that any person whose appointment will be challenged under this provision of the decree is a necessary party under Rule 19, Fed.R. Civ.P., and should be permitted to participate in any hearing, with counsel, full opportunity for discovery, and right to appeal.

C. *Prospective Hiring and Promotion Goals*

The proposed consent decree contains, in paragraph 9, hiring and promotion goals for all future examinations administered under the decree, with hiring goals of 55% for minorities and 10% for women, and promotion goals of applicant pool parity. The hiring goals appear to be based on a combination of labor force data and applicant flow for the 1982 entry firefighter examination.

The use of numerical hiring or promotion goals presents a real threat of "quota" hiring, based on race and sex considerations, not relative qualifications. Such preferences are constitutionally infirm where, as here, there is no history of egregious, intentional discrimination, and where there exist more narrowly tailored, race neutral

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[13] The proposed decree in paragraph 16 refers by general title to statutes which cover a variety of unlawful conduct. Plaintiff assumes the reference in the decree is intended to include only those provisions of the enumerated statutes which concern employment discrimination. We also note that, since the persons in question all currently hold the entry level rank of firefighter, it would require highly unusual circumstances for such a person to be found in violation of these statutes.

means of eliminating discrimination, *i.e.*, the development of valid selection procedures. Indeed, it is clear that the abandonment of the pursuit of valid procedures in favor of race-specific goals is inconsistent with the intent of the parties, which we understand to be to proceed in the future with the development of valid selection procedures by a panel of distinguished psychometricians. Several provisions of the proposed decree would seem to support the view that the intent of the parties is to develop valid tests, and to accept the results of those tests. In including the Court's prior requirement that the City develop valid examinations, and in providing in paragraph 5 that use of an examination not shown to be valid would be insufficient to justify failure to meet a goal, the decree at least implies that use of a valid examination would be a defense for such a failure. Yet, the language of paragraph 9 would permit the interpretation that the Court, even where a test is found lawful, could find the test somehow "inadequate" and order further steps to achieve a "goal." Indeed, that interpretation of paragraph 9 appears to be supported by its language regarding increased minority and female hiring goals, which makes no sense in the context of valid selection procedures absent some absolute obligation—not present here—to appoint particular numbers or proportions of minorities and or women regardless of relative qualifications.[14]

If the parties do not intend to permit the latter interpretation of the language of paragraph 9, the objection is easily resolved. Specifically, the decree should *expressly* provide that the use of valid selection procedures will eliminate all requirements for race-based hiring and promotions. If they do intend that interpretation, that position should also be made explicit, so that the Court can rule directly, and prior to entry of the decree, upon the constitutionality of such a provision in the context of this litigation.

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[14] See proposed decree, p. 10, lines 7-12 and lines 18-20.

D. *Additional Clarification*

The proposed consent decree and the attached letter of the City Attorney contain other significant provisions which should be clarified. First, the status of the City's November 12, 1987 letter should be established, for while it is incorporated by the decree and identified as the City's "agreed" interpretation of its obligations (par. 27), we have been informed by the City that it represents only the City's view, not that of the other signatories. Clarification is particularly necessary since some provisions of the letter, *viz.*, those regarding the manner of appointment of lieutenants under paragraph 11, seem inconsistent with the decree language and other provisions of the letter, *e.g.*, those regarding disqualified lieutenant applicants, describe procedures to be followed by this Court in administering the decree.

The parties should also clarify the basis on which decisions to override city charter and state law provisions is to be made. See, *e.g.*, paragraph 5 of the decree. If the purpose of these overrides is consistency with the City's explicit obligation to develop valid examinations, the decree should explicity so state.

This decree, if approved, will govern the operations of the SFFD for the next decade. It is in the interests of everyone that the obligations of the parties under that decree be clear. Accordingly, the United States requests that the signatory parties address these issues so that there can be a clear understanding of the decree before its entry.

E. *Restrictions on Rights of the United States*

The proposed consent decree purports to modify the City's obligation, under a court order obtained by the United States, to consult with the United States and other parties during the development of future examinations. The proposed decree also places significant re-

strictions on the right of the United States to object to future selection procedures, with any such protest to be resolved by a state administrative law judge whose decision will be final. Proposed decree, para. 15(c). The City and the private plaintiffs cannot impose obligations or restrictions on another party without that party's assent or acquiescence. See *Local 93* v. *City of Cleveland*, —— U.S. ——, 106 S.Ct. 3063, 3079 (1986). The United States neither assents nor acquiesces in this attempt to limit the ability of the United States to ensure that selection procedures used by the City in the future will be lawful.

The central issues in this litigation, as well as in the earlier *WACO* and State FEHC litigation, have concerned the validity of the City's selection procedures. The City, despite good intentions, has demonstrated repeatedly an inability to develop lawful selection procedures, using either its own personnel or, in the most recent firefighter and lieutenant examinations, using outside consultants. The United States has actively consulted with the City in its current efforts to develop new examinations including regular contact with the City's expert panel, two of whose members are the experts who would have testified for the United States, had the testing issues in this case been fully litigated. We believe that a continuation of this consultation is essential to the timely development and administration of lawful selection procedures.

In any event, there is no basis in the facts of this case for an attenuation of the right of the United States to seek relief from this Court, should we believe the City has failed in some respect in its obligation to use lawful selection procedures. Accordingly, those provisions of the proposed decree which eliminate the City's obligation to consult with the United States and which restrict our ability to object to examinations should be struck.

Conclusion

For the foregoing reasons, plaintiff United States submits that the consent decree as proposed by the City and the private plaintiffs is not reasonable, lawful and constitutional, and in particular contravenes the bounds of constitutionally permissible affirmative action with respect to promotions to the rank of lieutenant, and, absent clarification, with respect to the use of "goals" for future hiring and promotions. Accordingly, we respectfully submit that the Court should not approve and enter this decree in its present form.

Respectfully submitted,

/s/ Gerald F. George
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APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C84-7089 MHP

UNITED STATES OF AMERICA,
Plaintiff,

v.

THE CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, a municipal corporation; EMMET CONDON, Chief, City and County of San Francisco Fire Department; and CITY AND COUNTY OF SAN FRANCISCO CIVIL SERVICE COMMISSION,
Defendants.

No. C84-1100 MHP

FONTAINE DAVIS; ERIC H. WASHINGTON; JERILYN NORTH; *et al.*,
Plaintiffs,

v.

THE CITY AND COUNTY OF SAN FRANCISCO; DIANNE FEINSTEIN, MAYOR OF THE CITY OF SAN FRANCISCO; THE CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO; *et al.*,
Defendants.

OBJECTIONS OF SAN FRANCISCO FIRE FIGHTERS, LOCAL 798, IAFF, TO CONSENT DECREE AND SPECIFICATION OF EVIDENCE TO BE PRESENTED IN SUPPORT OF OBJECTIONS; REQUEST FOR STAY PENDING APPEAL

[Filed Dec. 10, 1987]

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I. PREFATORY STATEMENT

Defendant-Intervenor San Francisco Fire Fighters Local 798, International Association of Fire Fighters, by this document, objects to the terms of the consent decree tentatively approved by this Court in partial resolution of the above-entitled cases. Because the rights of the members of Local 798 are severely impaired by the terms of the decree and are so impaired without legal or factual justification for the broad scope of the relief granted by the decree, the union objects to the decree and requests that it be disapproved by the court. The union bases its objections on the records in these cases, the testimony to be given by witnesses identified herein, and the documentary evidence appended as exhibits hereto. In the event the union's objections are overruled, the union requests that an order be granted staying the effect of the decree pending an appeal by the union to the Ninth Circuit Court of Appeals.

II. PROCEDURAL BACKGROUND

This action concerns two separate suits filed in 1984 and consolidated thereafter. In action C84-7089 MHP, plaintiff United States of America challenged the lawfulness of entry level selection procedures in the San Francisco Fire Department, specifically the written and physical components used for the 1982 H-2 firefighter classification entry level examination. The United States also challenged the lawfulness of the selection procedure administered in 1984 for promotion to the rank of H-20 lieutenant.

Action C84-100 MHP was brought by Fontaine Davis and other individuals. Those persons were also granted status as plaintiff-intervenors in action C84-7089 MHP. Davis, et al., alleged sex discrimination in the 1982 entry level examination, challenged the validity and lawfulness of two promotional examinations, the H-4 fire inspector

and the H-20 lieutenants' examinations, and alleged that there exists a pattern and practice of racial discrimination in the SFFD resulting in a hostile environment for female and minority employees. Davis, et al., seeks class-wide and individual relief to remedy the aforesaid claims.

After a determination by the California Court of Appeal that an examination given in 1978 by the City and County of San Francisco for promotion to the rank of Lieutenant in the San Francisco Fire Department unlawfully discriminated against Black applicants, the issue of the remedy that should be granted to the victims of such unlawful discrimination was deferred to this court.

Because the instant cases were bifurcated for purposes of trial, the court has already awarded permanent injunctive relief in response to a motion for partial summary judgment over claims arising from the administration of the 1982 H-2 firefighter examination and the 1984 H-4 fire inspector and H-20 fire lieutenant promotional examinations.

That relief, ordered by the court on February 26, 1987, provides, inter alia, for the development of new selection procedures to be valid under the requirements of the Uniform Guidelines and Title VII for the ranks of H-2 Firefighter, H-4 Inspector, and H-20 Lieutenant, and prohibits the use of invalid selection procedures in other ranks. The order further provides that examinations for the above-identified ranks are to be administered by March 31, 1988. The order requires the defendants herein to undertake an aggressive recruitment program and imposes certain monitoring and record-keeping obligations to ensure compliance with the order. Finally, the order permits defendants to hire a specified number of candidates from the 1982 entry-level list for H-2 firefighter on a provisional basis and in accordance with race and gender-conscious quotas to alleviate a critical shortage of firefighting personnel in the San Fransico Fire Department.

The court stated in its order of February 26, 1987, that the evidentiary record before it at that time was insufficient to justify any relief beyond the injunctive relief and the provision for interim hiring referred to above:

> "On a record limited only to the bare fact that the City administered and then cancelled, prior to hiring, certain invalid examinations, the court, as a matter of law, cannot find a discriminatory denial of individual employment opportunities violative of Title VII." *Memorandum Decision and Order Granting Plaintiffs' Motion For Partial Summary Judgment*, fn. 7 at 18-19

The court also states, in the same order, that it:

> "is hesitant on the rather barren record of undisputed facts to attempt to identify the effects of past discrimination which possibly have lingered within the SFFD beyond the expiration of the *WACO* consent decree. This determination must be left to trial, when the court will have before it the full range of relevant evidence regarding the SFFD's satisfaction of the *WACO* consent decree's objectives. In light of this resolution, the court need not reach the subsequent question of whether the administration and cancellation of the examinations impermissibly perpetuated the effects of prior discrimination in a manner violative of Title VII. The court observes, though, that this determination is also more appropriately left to trial, when the court can consider the H-2, H-4 and H-20 examination procedures in the broader context of plaintiff-intervenors pattern and practice allegations."

Defendant-Intervenor Local 798 submits that the Statement of Undisputed Facts presented in support of the consent decree at issue herein adds no substantive facts to the record that was before the court on February 26,

1987, and which the court, as indicated above, deemed to be too barren to warrant any relief other than the injunctive relief granted by the court at that time.[1] A copy of the Stipulation of Undisputed Facts filed in this matter on August 15, 1986 is submitted herewith as Exhibit A.

Addressing the 22 items in the new statement of undisputed facts will demonstrate that no new facts warranting further relief have been presented to the Court.

¶ 4: This statement is patently false. Excerpts from the deposition of Frank Verducci, submitted herewith as Exhibit B, show that two items were eliminated from the test, and that all components were reweighted.

¶ 7, 8, 9: There are no allegations before the court that selection devices for the ranks of captain and chief have been unlawful or that the disparity in minority representation in those ranks is the result of any unlawful conduct.

¶ 10, 11, 12, 13: These items concern administration of the 1968 H-2 examination, challenges to which were resolved by settlement of Western Addition Community Organization, et al., v. Frank N. Alioto, et al., No. C-70-1335 WTS, through the entry of a consent decree. A copy of that consent decree is submitted herewith as Exhibit C.

¶29: The statement that the *WACO* action was never certified as a class action is of no consequence in view of the following language in the *WACO*

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[1] Of the 55 statements of undisputed fact submitted in support of this consent decree the 33 items numbered as follows are either direct recitations or variants of the statement of undisputed facts submitted August 15, 1986 upon which the court relied in formulating its order of February 26, 1987: ¶'s 1, 2, 3, 5, 6, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 44, 45, 46, 47, 48, 49 and 54.

decree: "As recited above, this action was never formally certified as a class action *though it was treated as such* and relief afforded plaintiffs as if a class had been certified. However, for purposes of settlement above, and for no other purpose, *the court is satisfied that a class should be and hereby is certified as* proper under Federal Rules of Civil Procedure 23 . . . ." Consent Decree (March 7, 1977) Civil Action No. C-70-1335 WTS at p.3. [Emphasis added.]

¶ 36, 37, 38, [39], 40, 41, 42, 43: These seven items outlining the procedural history of the state court litigation present no new information in view of the fact that this court was unaware, at least by the time it rendered its order of February 26, 1987, that the state appellate court had already "reaffirmed the administrative ruling that the City had failed to adequately demonstrate the validity of the exam." *Memorandum Decision, supra*, at p.8.

¶ 50, 51: The court was aware of these facts in entering its June 23, 1986 partial summary judgment, some 8 months prior to its award of injunctive relief.

¶ 52: This item is wholly irrelevant in view of the fact that the 1984 examination was withdrawn. These facts, without more, are wholly neutral and exhibit no evidence of wrongful conduct.

¶ 53: This item is irrelevant in view of the fact that the adverse impact of an examination not used to make employment decisions was the basis of the injunctive relief previously ordered by this court. No further remedy can be derived from this assertion.

¶55: This statement, without more, cannot be the basis for relief.

This statement of undisputed facts and the one previously submitted in this case on August 15, 1986 demon-

strate only that the San Francisco Civil Service Commission, the entity responsible for the administration of examinations for entrance into the Fire Department, has failed to administer entry-level examinations since 1986 which exhibited no adverse impact upon minority applicants. However, remedies for the challenged 1971 and 1973 examinations were provided as part of the settlement of the *WACO* litigation in the form of injunctions prohibiting hiring, setting lower cut-off scores and ordering one-for-one quota hiring of minorities, (see items ¶ 34, 35, 36, 37 of Exhibit A attached hereto). The *WACO* consent decree also mandated the manner in which the 1976 and 1982 entry-level exams were to be administered and used (¶ 39, Exh.A). It necessarily follows that the adverse effect of those examinations upon minority applicants cannot be deemed to have resulted from unlawful discrimination. The decree now before the court for approval thus purports to remedy a pattern and practice of unlawful discrimination within the San Francisco Fire Department for which there was no record as of the court's order of February 26, 1987, and for which there is no record now.

The San Francisco Fire Department, which has no responsibility whatsoever for hiring, for creating, administering or evaluating entry or promotive examinations, nor for determining who shall do so, is not conceded to have committed improper conduct in a single one of the undisputed facts. With the exception of a handful of isolated facts dealing with the Fire College and the department's internal complaint procedure, the alleged discriminatory effects of which were held by this court to be facts in dispute in its Order Granting Partial Summary Judgment of June 23, 1986, there is, quite simply, not a single fact stated which indicates that anything improper or unlawful was done within or by the Fire Department to create a hostile atmosphere for minority employees, or to perpetuate the effects of prior unlawful discrimination.

Hence, no relief is justified on the basis of such claims by plaintiff-intervenors.

As shown below, the San Francisco Fire Department has undertaken numerous steps to remedy racial tensions and to increase the number of minorities in all ranks of the department. These and other associated facts must also be considered by the Court in its determination of whether a factual basis exists for approval of this decree. Furthermore, the decree uses inappropriate labor pool statistics to establish adverse impact. If the appropriate figures were used, the degree of adverse impact on entry-level examinations would be lower, and would not merit the type of race-conscious relief proposed in this decree.

Finally, the affirmative relief granted in the form of promotions of minority members of the department is clearly unfair both to other minority members and to white members of the department, and goes far beyond the bounds of the relief that may lawfully be approved by the court even if there were a factual predicate to support a finding of unlawful discrimination in promotions in addition to the administration and use of the 1978 promotional examination for the rank of Lieutenant.

For all of these reasons, Local 798 submits that the evidence that has been presented to the court as support for approval of the consent decree is simply not adequate to justify such approval. In the absence of a competent evidentiary record establishing wrongful conduct by the defendant in the perpetuation of unlawful past discrimination and of a hostile atmosphere for minority employees, there is no foundation in fact or in law for the pervasive race and gender conscious relief awarded by that decree. It must therefore be disapproved.

III. ARGUMENT

A. *Because The Decree Lacks An Adequate Evidentiary Foundation, And Is Unreasonable Because Not Narrowly Tailored, The Court Is Without Authority To Approve The Decree*

Non-minority group intervenors in actions involving consent decrees which implement race-conscious hiring or promotional remedies have sufficient interest to contest the decree as unreasonable or unlawful (*Kirkland v. Dept. of Correction Svcs.*, 32 FEP 509 (2nd Cir., 1983) and a decree which contains provisions which are unreasonable. unlawful or against public policy may not be approved. *Berkman v. City of New York*, 31 FEP 767 (2nd Cir., 1983); *EEOC v. Hiram Walker*, 38 FEP 820 (7th Cir. 1985); *William v. New Orleans*, 34 FEP 1009 (8th Cir., 1984).

The extent of such intervenors' interest has yet to be determined, but courts have articulated procedures for approving consent decrees and the applicable law surrounding their entry. (See *United States v. Paradise*, 107 S.Ct. 1053 (1987); *Williams v. Vukovich*, 33 FEP 238 (6th Cir., 1983)). While settlement is encouraged, the district judge cannot summarily approve a Title VII settlement. An independent decision must be made in each case concerning the fairness of every provision in the decree. In a case involving a Title VII consent decree, the court is required to become more involved than in an ordinary case. Even when all the parties agree to the settlement the court should:

> "examine it carefully to ascertain not only that it is a fair settlement but also that it does not put the court's sanction on and power behind a decree that violated constitution, statute or jurisprudence. This requires a determination that the proposal represents a reasonable factual and legal determination based on the facts of the record, whether established by

evidence, affidavit or stipulation." *U.S. v. City of Miami*, 614 F.2d 1322, 22 FEP 846, aff'd in part and in part vacated and remanded on other grounds, 664 F.2d 435, at 441; 27 FEP 713 (5th Cir. 1981) (en banc).

Where, as here, the decree affects third parties the court must also carefully scrutinize the decree with respect to their rights and can only approve the decree if its effect on those parties is neither unreasonable nor proscribed (*Williams v. Vukovich*, *supra*, 33 FEP 238; *U.S. v. City of Miami*, *supra*, 664 F.2d at 441. Said determinations are generally made after a hearing has been held (*United States v. Paradise*, *supra*, 107 S.Ct 1053; *Kirkland v. Dept. of Correctional Svcs.*, *supra*, 32 FEP 509; *EEOC v. Hiram Walker*, *supra*, 38 FEP 820; *Williams v. New Orleans*, *supra*, 34 FEP 1009).

The reasonableness hearing is a forum for all interested parties to comment on the proposed decree. The ultimate issue the court must decide at the conclusion of the hearing is whether the decree is fair, adequate and reasonable. The court has no occasion to determine the merits of the controversy or the factual underpinning of the legal authorities advanced by the parties. If the court determines the decree is problematic, it should inform the parties of its precise concerns and give them an opportunity to reach a reasonable accommodation. The court should articulate its principled reasons for rejecting a decree if the accommodation is not satisfactory and in making the unreasonableness determination the court is under the mandatory duty to consider the fairness of the decree to those affected, the adequacy of the settlement to the class, and the public interest. (*Williams v. Vukovich*, *supra*, 33 FEP 238 and cases cited therein.)

Toward this end, courts are obligated to pursue two central inquiries: (1) whether there is an existing condition which can serve as a proper basis for the creation of race conscious remedies and (2) whether the specific

remedies of the compromise agreement are neither unreasonable nor unlawful (*Kirkland v. Dept. of Correctional Svcs., supra*, 32 FEP 509 at 517 and cases cited therein).

The Supreme Court has recently listed a set of criteria to be used to analyze the facts in regard to the latter inquiry. In *United States v. Paradise, supra*, 107 S.Ct 1053, the majority looked to four factors in determining whether race-conscious remedies were appropriate: the necessity for the relief and the efficiency of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

Local 798 submits that the consent decree at issue, when considered in light of these factors, cannot be approved.

The Proper Basis for Settlement

The preliminary approval of the consent decree rests on an inadequate foundation and was thus premature. The statistical findings from which the disproportionate racial impact has been established were based upon the labor pool in the City and County of San Francisco. It is generally agreed, however, that the appropriate labor market is the Standard Metropolitan Statistical Area (SMSA), which contains a substantially lower percentage of minorities. Without the proper labor market statistical data it cannot be determined whether the employer has utilized minorities at a rate less than the proportion in the area labor force.

The Reasonableness and Legality of the Settlement Agreement

Even assuming a racial imbalance is demonstrated under appropriate statistical analysis, the consent decree is improper as it was not narrowly tailored to accom-

plish its purposes to "eradicate the present effects of past employment practices with respect to minorities and women." This is made clear by application of the four factors set forth in *United States v. Paradise*, *supra*, 107 S.Ct. 1053, as shown below.

B. *The Factual Record Does Not Warrant Additional And Affirmative Relief Beyond That Already Awarded By This Court*

By its own terms, the consent decree at issue herein, purports "to insure that any disadvantage to minorities and females that may have resulted from past employment practices be remedied . . . ." Consent Decree submitted November 12, 1987, No. C84-7089 MHP, at p. 4. The hiring and promotional goals outlined in that decree, more properly characterized as quotas given the inflexibility of the decree, and the requirement that 27 minority members be given immediate promotions to the rank of lieutenant to the total exclusion of whites, provide relief that is wholly unnecessary in view of the injunctive relief already granted. Recent Supreme Court decisions in the Title VII area uniformly hold that the necessity of relief is a factor which must be analyzed in determining whether race-conscious remedies are appropriate. *United States v. Paradise*, (1987) 107 S.Ct. 1053, 1067.

The *WACO* litigation has resulted in remedies for successful challenges to entry-level examinations from 1970-1978. Local 798 submits that no additional relief, beyond the provisional and interim hiring of 48 candidates from the 1982 H-2 examination, coupled with an injunction mandating that a new and valid selection procedures be devised, is necessary given the judicial constraints and ameliorating efforts made by defendants in administering that examination.

The entry examinations occurring in 1971, 1973 and 1976 were all administered during the pendency of the *WACO* litigation. Where those exams exhibited adverse

impact, the court enjoined use thereof and mandated one-for-one hiring to remedy the adverse impact. (See ¶34, ¶36, ¶37 of Exhibit A.) The 1976 examination results were used according to the guidelines set forth in the *WACO* consent decree. (See ¶39, Exhibit A.) That decree also required the City to use a variant of the 1973 written examination for its 1982 H-2 examination with a "substantially similar" physical agility component. While the wisdom of requiring the City to use a variant of an exam previously determined to be lacking in validity is questionable, the City had no alternative but to follow the mandate of the decree.

The *WACO* decree imposed a good faith requirement on the City to meet a 40% goal for the hiring of minorities. No goal was instituted for promotions. Finally, the City was permitted to use the written portion of the entry level examinations for 1978 and 1982 with a cut-off of seventy (70%) percent and a weighing of forty (40%) percent in the overall score for any candidate. (See ¶38, Exhibit A.)

When the City failed to meet the forty (40%) percent goal in 1978, plaintiffs in *WACO* again challenged the City's action in certifying the list and after losing the challenge re-filed their challenge in January of 1982. These events are outlined in the *Memorandum and Order* of June 9, 1978, and *Report of Special Master*, September 27, 1982, No. 70-1335 WTS, true and correct copies of which are submitted herewith as Exhibits D and E.

The court found that the City had not acted in bad faith in failing to meet the forty (40%) percent goal in 1978, and that the only reason for not meeting that goal, despite adequate recruitment, was the failure of minorities to appear to take the examination. The special master dismissed the January 1982 challenge on the grounds that plaintiffs had presented no evidence whatsoever that the City was in any way at fault for the failure of recruited minority applicants to take the examination.

An analysis of the administration of the 1982 examination must arrive at the same conclusion that the City has acted in good faith. Given the fact that the City was compelled to use a variant form of the exam used in 1976 and 1973, the City was aware that adverse impact might result. To counter such an effect the City and the San Francisco Fire Department engaged in an aggressive and highly successful recruiting program, lowered the passing or cut-off score from seventy (70%) percent to sixty (60%) percent on the multiple choice examination, and eliminated the multiple choice component as a ranking device. (See ¶43, and ¶47 of Exhibit A.) Prior to the onset of the instant litigation, the Civil Service Commission also approved the selective certification of "up to 20 females" who passed the physical agility component to make up for adverse impact of females resulting from using that component as the ranking device of the exam. Such approval of selective certification of women occurred at a Civil Service Commission meeting of November 14, 1983. A true and correct copy of the minutes concerning that approval is submitted herewith as Exhibit F.

The City and the Fire Department engaged in a hugely successful recruiting program for the 1982 H-2 examination. Item 43 in the Statement of Undisputed Facts submitted in support of this Consent Decree states that "in 1983 7273 persons applied for the position of firefighter within SFFD, 2034 (or 27.9% of whom were Black; 695 (or 9.5%) of whom were women; 1003 (or 13.8%) of whom were Hispanic and 529 (or 7.3%) of whom were Asian." Given that Blacks compromise 9.2% of the local workforce, and constituted almost 28% of the applicants, one can hardly deem the recruitment effort inadequate!

Indeed, Carl Holmes, one of the experts designated by Plaintiff-Intervenors as a witness to testify at the trial of this action, acknowledged that the 1982 recruitment drive was a model drive:

"Q. [by Deputy City Attorney Lynch] If the San Francisco Fire Department were to look to another City for a model recruitment program, what city would you suggest?

A: [Mr. Holmes] Oh, let's see.

Q: Or cities?

A: Tell you the truth, San Francisco could look at the one they had in '82. Thats a dog-gone good model right there." Excerpt from the Deposition of Carl Holmes, October 13, 1987, at 57, submitted herewith as Exhibit G.

Local 798 also intends to present testimony from Earl Gage, John Sherratt, Peter Turdici, John Drocco and Charles H. Lee as witnesses at the fairness hearing as to the extensive recruitment efforts and other actions taken by the City to enhance minority representation in all of the ranks of the San Francisco Fire Department. The attachments to the declaration of Charles H. Lee submitted herewith and the documents submitted herewith as Exhibits H, I, J, K, and L will be introduced as documentary evidence on this issue.

The deposition of retired Chief of the Department Andrew Casper, submitted herewith as Exhibit M, is further evidence on this point.

Finally, in conjunction with the 1982 H-2 examination, Local 798 reiterates that all applicants were eligible to and were advised to participate in freely available training exercises for the physical component. When most women failed to pass, the City initiated and funded a training program at the YWCA (¶67, Exh. A) and re-administered the physical agility test to women who had failed it previously. This action, taken in conjunction with the re-weighing of the exam components, might today be illegal under the holding of *Berkman v. City of New York* (2d Cir. 1987) 43 F.E.P. 318, even if the

purpose of the actions is to increase the number of women in the department.

Plaintiff-intervenors have supplied not a single fact to support the proposition that the City is responsible in any way for the drop-off in the number of minority applicants and in the number of those taking the exam, or that the city could have avoided that occurrence. The language used to support dismissal of the *WACO* plaintiffs' 1978 and 1982 challenges in the Special Report cited above is applicable in this situation as well.

> Taking plaintiffs' pleadings and oral argument in a light most favorable to them, it appears that one theory of their motion is that many black member of the 47% minority pool failed to take the firefighters examination because they were intimidated from doing so by pervasive discrimination against blacks within the fire department. Evidence (from the purported offer of proof) on which plaintiffs will rely to establish pervasive discrimination by the city consists of instances of alleged discrimination by individuals against one black fireman which took place *after* members of the pool failed to take the examination. These alleged acts are not relevant as causes of conduct which occurred prior to their taking place. The fact that in 1978 the Court found the reason for failure to reach the 40% minority hiring goal to be the failure of blacks to take the examination, rather than pervasive discrimination, is not addressed. No theory is advanced as to how that issue can now be relitigated and a new finding substituted for the existing finding.
>
> Another theory of plaintiffs' motion seems to be that due to pervasive discrimination by the city (to be proved by the same acts of alleged discrimination by individuals against one black fireman) many blacks resigned from the fire department after appointment from the 1978 eligible list with the result

that the present fire fighting force is composed of 22% minorities rather than 40% as required in the goal. *There is no offer to prove appointments from the 1978 eligible list were made in a discriminatory manner by the city.* A legal reason for relitigating the cause of only 30.2% of the list being composed of minorities is not provided. In these circumstances, the propensity to drop out already established in this litigation may be inferred as the cause of minority resignations with greater assurance than alleged discrimination against one fireman. At any rate, such evidence does not prove the pervasive discrimination by the city alleged by plaintiffs.

We conclude that plaintiffs' "Pretrial Offer of Proof" filed July 1, 1982 must fail because no admissible evidence is offered, and, even if admissible evidence had been offered, because no theory allowing relitigation of 1978 issues has been advanced.

Plaintiffs have difficulty finding substantive law to support their motion. For example, they cite *E.E.O.C. v. Bartenders International Union, Local 41*, 22 E.P.D. ¶30,700 as authority for extension of the consent decree. In that case all the litigants sought an extension whereas in plaintiffs' case, extension of the decree is contested. Further, no authority is cited for the proposition that a decree which has already expired in accordance with its terms may be extended without the agreement of all the parties."

Exhibit E, pp. 4-6

Finally, as indicated elsewhere in this brief, it has never been determined, as a matter of law, the relevant workforce statistics is properly derived from the SMSA, or Standard Metropolitan Statistical Area. The San Francisco SMSA includes, for example, Marin County where the percentage of the black civilian labor force is

1.5% of the total workforce. (See e.g. State of California Employment Development Department, *Manpower Information For Affirmative Action Programs, Marin County*, May 1980). Given the commuter-patterns for the Fire Department, the proper workforce data should be derived from the Standard Consolidated Statistical Area (SCSA) which includes the nine (9) counties surrounding the City and County of San Francisco, many of which have far fewer minorities than does the City and County of San Francisco.[2]

Assuming, arguendo, that the relevant minority workforce statistic derived from either the SMSA or the SMSA is lower than 9.2%, one would have to reconsider not only the appropriatenes of the goals in this decree, but also the fact that the extent of adverse impact against Blacks in past hiring decisions would be reduced. The 1973 H-2 list resulted in 10.6% of Black hires; the 1978 list resulted in 8.9% of Black hires. These figures are not radical departures from the 9.2% figure which, because limited to the San Francisco workforce, is improperly used and falsely low.

With regard to the question of whether Department personnel have contributed to the maintenance of a hostile environment for minorities, a claim for which no fact is presented in the undisputed facts supporting this decree, the department has undertaken numerous steps to reduce racial tension. The testimony and exhibits referred to above will show that as of March 10, 1980 the Fire Department has done the following:

> (1) instituted a Human Relations Grievance Committee charged with the responsibility of investigating charges of racial harassment. All departmental organizations, including the Black Fire Fighters had representatives at this committee. (See Excerpt from

[2] 1980 Census of California, Volume 1: Characteristics of Population, Chapter A, part 6, California Issued 3/82.

the deposition of Robert Rose, pp. 117-122 attached hereto as Exhibit N.)

(2) initiated a Human Relations Course for Supervisors lasting sixteen (16) hours and taught by Community College Staff.

(3) initiated a Human Relations course for recruits at the Fire College.

(4) recognized the Black Firefighters Association.

(5) requested the U.S. Department of Justice Community Relations Division to mediate the existing racial disputes.

The aforesaid testimony and documentary evidence will show that since 1980, the Department has undertaken further steps to alleviate tension based in race and gender problems by the following:

(1) instituting a human relations training course in 1982, taught by psychologist, Dr. Dent, to all department personnel.

(2) developing a complaint and grievance procedure bypassing department personnel and going directly to Civil Service.

(3) training company officers in the area of sexual harassment.

(4) establishing an Employee Assistance Program to combat job stress and provide confidential counseling for work-related problems.

(5) enacting numerous General Orders prohibiting conduct which has lead to complaints of racial harassment in the past.

The premise underlying the Uniform Guidelines is two-fold: first the Guidelines seek to objectify selection criteria by removing subjective aspects which have

worked to the detriment of minorities in the past; second the guidelines seek to assure that selection criteria are based on qualifications evaluated by job-related criteria.

The injunctions already issued, coupled with an aggressive recruitment effort, are sufficient to bring appropriate numbers of women and minorities into the department. Since any examination exhibiting adverse impact would be subject to review, no party need fear that wrongful hiring decisions will be made during the seven-year period the injunction is in effect. Goals or quotas merely create additional obstacles to the effectuation of the hiring plans facilitated by the injunctive relief awarded. They are not warranted by the facts. For the reasons stated above, there is no factual predicate warranting the relief contemplated by this decree for either entry-level hiring or to remedy a hostile work environment.

C. *The Flexibility and Duration of the Relief and the Availability of Waiver Provisions.*

The features of the proposed consent decree indicate that it is inflexible in its operation. Although labeled "goals," the decree clearly establishes fixed quotas. The decree provides for manipulation of residency requirements, list duration, examination weights and seniority components. Paragraph 5 provides for a panel of experts with authority to override the Civil Service Provisions of the City Charter regarding seniority, education credits and other selection procedures. Paragraph 9 allows the court to order additional steps where actions, although legal, prove inadequate to meet the "goal." Consistent with a quota or ceiling, Paragraph 9B allows the goal for female hiring to be raised if it is discovered there are sufficient qualified candidates. Paragraph 9 also seems intended to guarantee the appointment of a particular number of minority fire fighters during the life of the decree in that it provides for the modification of the

hiring goals if fewer than 500 hires occur during its term.

Most significantly the decree mandates the appointment of twenty-seven minorities to the position of fire lieutenant without the availability of a waiver provision for qualification. In *Paradise* the court found the one-for-one requirement to be flexible in application as the requirement could be waived if no qualified black candidates were available (*Paradise* at 1070). In that case the department had been permitted to promote only white troopers to the rank of lieutenant and captain since no black troopers were qualified. Further, the provision applied only when the department needed to make promotions and procedures lasted only until the department came up with a procedure that did not have a discriminatory impact on blacks (*Id.*).

Here, the decree requires 100% of twenty-seven positions to be filled in rank order from the lists generated as a result of concededly invalid 1984 examinations. No minimum qualifying score was ever established for use on any of the components of this lieutenant examination. Every person who completed the test is on the list. Clearly this agreement would require the appointment of a number of fire lieutenants who would not be ranked even in the top half of the 415 persons tested.[3]

It is well established that where a party is not qualified for a position in the first instance, affirmative action considerations do not properly come into play. *Bratton v. City of Detroit*, 704 F.2d 978; 892 (6th Cir. 1983); *Williams v. City of New Orleans*, *supra*, 34 FEP 1009. See *Youngblood v. Dalzell*, 42 FEP 415, decree was narrowly tailored in that no qualified white was denied ad-

[3] Where appointments are made on the basis of an unvalidated exam in the absence of nearly any other screening criteria such that the hiring decision is based almost entirely on a number, the goal is an unlawful quota. *Hammon v. Barry*, 44 FEP 869.

vancement and only *qualified* black candidates received promotions; *League of Martin v. City of Milwaukee*, 42 FEP 562, accelerated promotions of minorities were from among *qualified* applicants; *Local 93 v. City of Cleveland*, 106 S.Ct. 3063 (1986), 41 FEP 139, consent decree was reasonable in that the plan did not require hiring of unqualified minority fire fighters; *U.S. v. City of Buffalo*, 37 FEP 1729.

All fire fighters have a legitimate expectation to be promoted on the basis of their qualifications. Correspondingly, the City has the responsibility to promote only qualified candidates. *Williams v. Vukovich*, *supra*, 33 FEP 238. In the instant situation, there are no reliable guidelines to ensure that those who will be promoted under the challenged decree are qualified. While this proposed decree states that no unqualified person need be hired or promoted, it nevertheless provides that twenty seven (27) appointments are to be made from a list of individuals who merely completed an unvalidated examination, regardless of whether their scores were above the passing score on that examination or not. The provision for these appointments must therefore be excised from the decree as further discussed below.

Additionally, these provisions are infirm in that they apply regardless of whether the department needs to make promotions and regardless of whether the department can develop a non-discriminatory procedure or preferred remedy. Unlike *Paradise*, there is no need to make these appointments at this time. The SFFD has operated effectively without permanent appointments to these positions for years. The interests of all concerned would be better served by the development of a valid lawful selections procedure than by the race conscious remedy proposed in the decree which mandates the appointment of individuals of questionable qualification.

Finally, the intended duration of the decree, for the next seven to ten years, is unreasonable and unnecessary.

Courts seem to be in general agreement that a consent decree should not last longer than five years. See *League of Martin v. City of Milwaukee*, 42 FEP 562, five year duration; *Local Number 93 v. City of Cleveland, supra*, 106 S.Ct. 3063, decree life shortened from 9 to 4 years; *Black Grievance Comm. v. Phil. Elec. Co.*, 41 FEP 1801, five year duration, *Williams v. New Orleans, supra*, 34 FEP 1009, twelve year duration improper as would span nearly entire career of many non-black officers. Thus the probable duration of the consent decree at issue of ten years is not in keeping with current authority. Moreover, the life of the decree is particularly unreasonable in light of the fact that the SFFD had been operating under the WACO order from 1977 until 1982, thus bringing the total number of years of judicial intervention and control to a patently unjustifiable 12-15 years. The remedy chosen has thus been shown to be inflexible, wholly lacking in appropriate waiver provisions and unnecessarily long in duration.

D. *The Relationship of the Numerical Goals to the Relevant Labor Market.*

The long term goals of the decree require the department to hire women at the rate of 10% (half to be minority) until women equal ten (10%) percent of the sworn personnel and to hire minorities at a rate of 55% until minorities represent forty (40%) percent of sworn personnel of the SFFD.

The forty (40%) figure seems to be the percentage plaintiff intervenors believes reflects the percentage of minorities in the labor market. This number, however, is improper as it was calculated on the basis of data for the City and County of San Francisco. A threshold requirement for comparison of numbers of people hired or rejected must be to the *relevant* labor market. *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736 (1977). Where the position under review

is that of entry-level firefighter, the courts have held that the general population is the appropriate labor pool because firefighting is a skill that the general population may possess. *See e.g. Pina v. City of East Providence* (1980 D.C.R.I.) 31 F.E.P. 230, 235.

Once the appropriate labor group is established, the relevant geographic area for the labor market must be defined. As a general rule the relevant geographic area is that from which the employer "can reasonably be expected to recruit." *Woodward v. Lehman* (D.C.S.C. 1982) 31 F.E.P. 304, 310. Where the focus of the dispute is a major urban center, the relevant labor market is generally considered to be the "Standard Metropolitan Statistical Area" (SMSA) which is defined as the geographic area comprising a city having a population of 50,000 or more, the county in which the city is located *and the outlying counties that have a high degree of economic and social integration with the nucleus [citation].*" [Emphasis added.] *EEOC v. Chicago Miniature Lamp Works* (D.C. Ill. 1985) 39 F.E.P. 297, 301. *Williams v. City of New Orleans* (5th Cir. 1984), *Hammon v. Barry*, citing *Johnson v. Transportation Agency* 43 FEP 411 (S.Ct. 1987), relevant labor force consists of persons in Washington Metropolitan Area not just within the confines of the nation's capital.

Relevant factors in determining the boundaries of the SMSA are:

> (a) the location of the employer within the SMSA; (b) the accessibility of the employer; (c) commuting patterns; and (d) in appropriate cases, the employer's applicant flow.
>
> *EEOC v. Chicago Miniature Lamp Works, supra,* 39 FEP at 301.

Local 798 submits that for purposes of comparing the hiring and promotion statistics in the SFFD with those

of the relevant labor market, the appropriate labor pool is the greater Bay Area rather than the City and County of San Francisco. The consent decree is predicated upon a statistical showing derived from an artificially restricted labor pool which skews the resulting minority profile in an impermissible manner.

The fact that the City was constrained by the requirements of the *WACO* decree to recruit only within the City and County of San Francisco is not determinative of the matter. The residence requirement in the *WACO* decree had the effect of increasing the minority representation in the labor pool and must be considered to be a relevant factor in the City's efforts to increase minority representation in the Fire Department. The residence requirement nonetheless distorts the profile of both the applicant pool and the relevant labor market. In order to review statistical evidence in the proper context, one must consider the "untainted" applicant flow. "Untainted applicant flow data shows both (a) the area from which the employer has historically drawn applicants and (b) the racial and ethnic composition of the employer's actual applicant pool." *Id.* at 301. Defining the appropriate labor market as the City and County of San Francisco is inappropriate because it "does not reflect (a) either the area from which it would be expected to draw applicants in an unbiased environment or (b) the racial and ethnic composition of the civilian labor force in that area [citation]." *Id.* at 302.

It is undisputed that the racial and ethnic composition of the Bay Area in general is quite different from that of the City and County of San Francisco in particular. Whether or not a given examination or promotional selection procedure has demonstrated adverse impact, and the egregiousness of any such adverse impact used to justify remedial relief, must be considered in light of the legally relevant labor market.

The numbers set forth in the decree do not represent a comparison between the proper relevant labor market: rather they represent an artificially restricted one and are thus an improper basis for a hiring objective and cannot be approved.

Furthermore there appears no justifiable reason to impose an accelerated process, requiring 65% of all new hires to be female or minority, until female and minorities comprise respectively ten (10%) percent and forty (40%) percent of the sworn personnel. In *Sheet Metal Workers v. EEOC*, 41 FEP 107, and *Paradise*, egregious violations were found. In both cases the employers had resisted following court orders with regard to integrating the work force. It was thus determined that, under the circumstances, some promptness in the administration of relief was plainly justified, indeed the department's delay and the continued default of its obligation required the court to consider an accelerated method of implementation. (*Paradise* at 1072.)

In the instant case the City has not resisted court orders, indeed it finds itself in the unenviable position of being challenged in part because it *followed* the requirements of the *WACO* decree. The accelerated provision is therefore unjustified and the hiring percentage goals should be expressed in terms of the percentage of minorities in the relevant labor pool.

Finally the minority appointments required are unlawful and unreasonable as they go beyond remedying any imbalance in the promotive work force. The decree requires the appointment of at least 33 minority firefighters to the position of Lieutenant. (¶ 11, 16) The current 1297 person force includes 202 minorities (15.6%) of which 18 (6.5%) hold permanent supervisory positions. After the appointments mandated by the decree, 63 minorities will hold 17.6% of the 359 supervisory positions. This is seven more than would

be expected. This promotive scheme is thus not narrowly tailored to remedy a manifest imbalance.

A court cannot impose racial goals that do not reasonably relate to the racial composition of the relevant work force from which the employees are drawn. The hiring "goals" in the instant case are based upon an improper artificially restricted labor pool rather than the judicially sanctioned Standard Metropolitan Statistical Area (SMSA) and are therefore improper. Additionally, the promotions required by the decree are arbitrary and unlawful. Considering the current minority percentages the appointments go beyond remedying any imbalance now present in the SFFD promotive ranks by actually placing a higher proportion of minorities than is warranted by the applicant pool percentages into promotive positions. Accordingly the hiring and promotive goals are unreasonable and unlawful since they do not substantially and reasonably relate to the relevant workforce pools and thus cannot substantially relate to the objective of eradicating a manifest imbalance.

E. *The Decree Unnecessarily And Unreasonably Trammels The Rights Of Non-Minority Employees*

The consent decree at issue herein provides in paragraph 11 that six (6) named individuals victimized by the 1978 lieutenants' examination shall be promoted to the rank of lieutenant with all benefits incident to the promotion, and that they shall take a make-up H-30 Captain's examination. This provision is clearly intended to remedy the violation arising from use of the eligibility list derived from the invalid examination given in 1978. In paragraph 16 the decree provides that an additional twenty-seven (27) minority candidates from the list generated from the cancelled 1984 lieutenants' examination shall be immediately promoted to the H-20 lieutenant rank. The department may thereafter promote up to forty-eight (48) additional individuals from that

list according to a quota of one minority in each four appointments. The decree also provides for promotional goals.

It is manifestly unclear what violation, if any, paragraph 16 is intended to remedy. The bottom line however, is that the decree requires that twenty-seven (27) minority candidates be promoted to the total exclusion of white candidates from an eligibility list challenged by the minority plaintiffs themselves as being derived from an invalid examination. This court has previously determined that because no employment decisions were made as a result of this list, that no relief beyond injunctive relief was appropriate, and such injunctive relief was to be granted for the sole purpose of assuring that the City would not administer unvalidated examinations in the future. (*Memorandum and Decision* of February 26, 1987.)

Prior to 1978 there had been no proven allegations that defendants had violated Title VII in promotional procedures. As indicated above, a remedy for the individual victims of that exam is provided by this decree. The only conclusion remaining is that the immediate promotion of twenty-seven (27) additional minority members to the rank of lieutenant must be considered to be a voluntary remedy to correct a disparity in minority representation in the lieutenants' rank. If this is, indeed, voluntary affirmative action intended to redress no proven violation of Title VII, the propriety of that action must be subjected to review under the standards for voluntary affirmative action first announced in *United Steelworkers of America v. Weber* (1979) 443 U.S. 193, 20 F.E.P. 1.

The fact that affirmative action is voluntarily provided under a consent decree does not render such action immune from attack if equal protection is denied majority group members. In *Local 93, International Association of Firefighters v. Cleveland* (1986) 106 S.Ct. 3063 the court warned that

> "the fact that the parties have consented to the relief contained in the decree does not render their action immune from attack on the ground that it violates § 703 of Title VII or the Fourteenth Amendment."

Id. at 3077-78.

The *Weber* case sets forth four criteria by which to guage whether voluntary affirmative action is permissible under Title VII requirements. The standards distilled from *Weber* require that the plan (1) must be designed to break down old patterns of racial segregation and heirarchy; (2) must not unnecessarily trammel the interests of the white employees; (3) must not create an absolute bar to the advancement of white employees; and (4) must be a temporary measure intended to eliminate a manifest racial imbalance. *Steelworkers v. Weber, supra*, 20 F.E.P. at 7. These requirements are discussed seriatim as follows:

(1) *Breaking down old patterns*:

Once validated tests are administered, first at the entry level and then at the promotive level, old patterns will resolve themselves. As shown above, the 1973 and 1978 H-2 Firefighter lists resulted in excess of 8% blacks being hired from each of those respective lists. There has been no showing, with the exception of the 1978 H-20 examination, that a disparity in the number of minorities currently in the lieutenants' rank, based on the percentage of minorities in the labor pool of H-2 Firefighters, derives from improper conduct. Since 1971 there has been a larger percentage of minorities in the relevant pool than have been promoted. Without more, the court cannot speculate that the reason for the disparity is based on wrongful conduct. The cases that have found wrongful conduct at the promotional level

have done so on a far stronger evidentiary basis.[4] These cases must be contrasted with those where there was a statistical disparity, but no egregious conduct. For example, in *Guardians Assn. v. Civil Service Comm.* (2d Civ. 1980) 630 F.2d 79, 23 F.E.P. 909, 934 the court stated as follows:

> "it would be contrary to Title VII's provision allowing the use of valid exams to hold that once an employer tries to construct such an exam and fails, any further failure to develop a valid exam constitutes intentional discrimination. Such a second attempt, by itself, is evidence only of desire to make use of a technique that the law explicitly allows. Persistent use of exams with disparate racial effects would support an inference of intentional discrimination if proper test construction were not even attempted. But the record here indicates that the City's police and personnel officials made extensive efforts to understand and apply the Guidelines and develop a test they hoped would have the requisite validity. Their failure entitles the plaintiffs to some relief, but does not justify a remedy based upon an unwarranted inference of deliberate discrimination." *Id.* at 937.

Figures set forth in an earlier section of this brief indicate that if twenty-seven (27) minorities from the 1984 list, and six (6) from the 1978 list are promoted, that this will result in a greater percentage of minorities in the lieutenant's rank than would normally be expected. Even if promotions for the six (6) victims of the 1978 examination are removed from the equation, there is no legal authority under which the accelerated

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[4] In *United States v. Paradise, supra*, 107 S.Ct. 1053, the court found a 37-year exclusion blacks from the promotive ranks in addition to finding a "persuasive, systematic, and obstinate discriminatory conduct" arising from the fact that there were *no Blacks* in the lower ranks. *Id.* at 1065.

promotion of twenty-seven (27) minority individuals to the total exclusion of whites can pass the strict scrutiny under which the court must review such race conscious relief. *Wygant v. Jackson Bd. of Education* (1986) 106 S.Ct. 1846; *Fullilove v. Klutznick*, 448 U.S. 448, 491. This provision is patently unreasonable and must be rejected by the court on that ground.

(2) *Interests Of White Employees*

The interests of white employees are compromised for the following reasons: (a) the decree does not *require* that any whites be promoted; (b) there has been no showing that the twenty-seven (27) minority members required to be promoted are qualified; (c) the decree provides for promotion of twenty-seven (27) individuals from an invalid list where those individuals have not been harmed by any employment decision relative to that list; (d) interests of white persons on the current (and frozen) H-30 captains' list are compromised insofar as there has been no showing that the means by which the six victims of the 1978 examination will be integrated into the existing H-30 list will be by a valid examination and standardizing procedure which will assure that each black candidate is more qualified than the people below the blacks newly integrated into that list; (e) the decree's provision that people who violate Title VII are subject to a denial of promotions, deprives white employees of due process and the protections of Title VII.

With the exception of those situations in which there was a demonstrated need for immediate promotions (e.g. *Paradise*) Local 798 is aware of no cases, either in voluntary affirmative action or in court-ordered affirmative relief cases, where accelerated promotions have been made from a tainted list. Promoting a ratio of 27:0 from an existing list that has no established passing score and that has been rejected for use for alleged invalidity has no precedent even in emergency hiring or

promotion situations. *Weber* and its progeny, even up to and including the *Paradise* case have found 1:1 promotion ratios valid under specific circumstances. While individual victims of discriminatory acts may be entitled to accellerated promotions, there is no such justification on the record currently before the court as to the twenty-seven (27) promotions.

Assuming, arguendo, that the City made the forty-eight (48) additional promotions which the decree permits (but leaves to the City's discretion) so as to mitigate the minority-only promotion requirement of the decree, an additional twelve (12) minorities would be appointed under the 1:4 ratio set for promotion of these forty-eight (48) candidates. Added to the twenty-seven (27) promotions already provided for, and including the fact that some of the six (6) Blacks promoted pursuant to paragraph 11 might also be on this list, one would have to go down the list, at a minimum to the 39th minority candidate on the list. Exhibit O submitted herewith is a copy of that list. Local 798 will call Geoffrey Rothman, an employee of the San Francisco Civil Service Commission, to testify that the twenty-second black applicant on that list holds position 276 on the list, which is far below the midpoint of the 415 applicants who took the examination. Rothman will also testify that some of the black applicants who will receive such promotions answered only fifty percent (50%) of the written multiple choice questions correctly and received an evaluation of "unacceptable" on the writing skills component of the examination.

There has been no passing score set for the 1984 H-20 examination or for any of the components of that examination. In 1978, 577 persons took the H-20 exam, and roughly 40%, or 250 individuals, passed that test. Assuming that the pass rate for this exam were set similarly, 166 individuals would be expected to pass at the 40% level.

Section 706(g) of Title VII (U.S.C. § 2000-e(5)) prohibits the court from "requir[ing] the . . . promotion of an individual as an employee who was refused . . . advancement . . . for any reason other than discrimination . . . ." The cases, e.g. *Weber* and its progeny, have uniformly held that this section means that the court is not empowered to sanction the promotion of unqualified individuals. The Supreme Court, in its *Paradise* holding that one-for-one promotions, based on necessity, were appropriate for a one-time use of an invalid list, were acceptable partly because

> "the requirement may be waived if no qualified black candidates are available. The Department has, for example, been permitted to promote only white troopers to the ranks of lieutenant and captain since no black troopers have qualified for those positions. Further, it applies only when the Department needs to make promotions."
>
> *United States v. Paradise, supra*, 107 S.Ct. 1953, 1070 (1987).

To the extent that the promotional goals may also require the City to promote unqualified individuals, those goals, as discussed above, are also unreasonable.

The provision of paragraph 13(e) prohibiting the city from administering a promotional examination for the rank of Battalion Chief in 1990 until there are at least ten (10) Blacks holding the permanent rank of Captain or above is equally unreasonable. This provision penalizes black employees as well as white employees and accomplishes no benefit for anyone.

Local 798 also objects to the delay of the next promotional examination for the rank of Lieutenant from March of 1988, as currently required by the Court's order of February 26, 1987, to December of 1988, as provided in paragraph 13(a) of the consent decree. This delay adversely affects the careers of all employees who

are presently eligible for promotions to that rank, solely for the benefit of a few new employees who may become eligible to take the examination because of such delay. To disadvantage a great number of employees solely to benefit a very few is clearly unreasonable.

Finally, the provision in paragraph 16 stating that no person found to have violated certain identified civil rights laws shall be promoted to lieutenant raises the specter of some unidentified extra-legal proceeding which will pass on whether or not an illegal act has occurred. Unless the decree expressly states that any violation of the Civil Rights Act of 1866, 1871, or 1964 as amended in 1972, and the State and Local Fiscal Assistance Act will be proved in a court of law according to the administrative, evidentiary and other requirements of those laws, this provision cannot stand. Whether a violation of any of those laws has occurred is itself a question of law and fact which only the courts are empowered to review. The implication that such a review might be made by the City, or by plaintiff-intervenors, or both, is not only bizarre, it threatens the due process to which any individual accused of violating those laws is entitled.

(3) *Promotions As Absolute Bar*

Insofar as the decree *requires* promotion of minorities only, it is patently creating an absolute bar to the advancement of whites. The provision that up to thirty-six (36) whites and twelve (12) additional minorities *may* be made does not save this provision. In view of the facts that: (a) there is no demonstrated or urgent need to make promotions between the current time and March, 1988 when new exams are to be administered; and (b) there is no justifiable basis for making a total of seventy-five (75) promotions (27 and 48) from a concededly invalid list with only 415 names and no established pass-rate, the court may not approve the decree on

the ground that there exists an inchoate possibility that as many as thirty-six (36) whites could, conceivably, be appointed. As indicated above, unless individual victims of discriminatory practices can be identified, there is no authority permitting promotion of minorities in greater than a one-to-one ratio to whites.

(4) *Temporary Measure*

Weber and its progeny provide that voluntary affirmation action should be a "temporary measure . . . not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." *Steelworkers v. Weber, supra*, 20 F.E.P. 1, 7. If the court were to permit appointment of thirty-three (33) (27+6) minorities to the rank of lieutenant, there would no longer be a racial imbalance, much less a "manifest" one, such that future goals would be necessary. The decree wants both accelerated promotions to correct an imbalance and future goals to maintain such balance. Once valid examinations exist, as they are required to within four months, there is no need for either of these remedies.

Finally, the hiring provisions of the decree have an unreasonably harsh effect on the rights of white entry-level applicants. A 65% hiring requirement over the seven to ten year life of the decree will have severe and long-lasting effects on the rights of non-minorities. Courts have allowed such accelerated hiring provisions only where tempered by other aspects of the decree or mandated by the egregious nature of the violation.

For example in *United States v. City of Buffalo* (1985) 37 F.E.P. 1729 the decree ordered that 50% of all entry level appointments be made from minority applicants until their composition of the police and fire department equalled 50%. The decree further provided, however, that the race conscious hiring goals must end when the city proves its current selection procedures to be valid. (See also *Hammon v. Barry, supra*, 44 F.E.P. 869. Be-

cause available race neutral alternatives were not considered the district court's race-based hiring methods were found not properly tailored to its remedial purpose.)

Neither circumstance applies herein. As stated previously, the decree is wholly lacking in waiver provisions. Race neutral alternatives do not appear to have been seriously considered and there is no provision to end the hiring goal if the employer provides a valid selection procedure. Furthermore, unlike *Sheet Metal Workers* (Local 28, *Sheet Metal Workers v. EEOC* 51 F.E.P. 107 or *Paradise* in which the employer resisted following court orders with regard to integrating the workforce, and there had been repeated judicial findings of egregious violations, the instant case demonstrates that the City followed the requirements of the *WACO* decree.

The decree mandated use of a written entry-level examination first administered in 1973, which, when administered in 1973, did not demonstrate adverse impact. The decree also mandated use of a residency requirement to increase the minority composition of the applicant pool. As outlined above the effort to extend and modify the decree based on a charge that the City had not met its obligations under the decree was rejected on the grounds that the City had acted in good faith; the decree was not extended by the court.

The actions of the Civil Service Commission in invalidating the 1982 entry-level examination preclude any finding that the City has engaged in unlawful hiring practices, as the court has previously acknowledged. To the extent that the City has complied with the *WACO* consent decree since 1977, a similar finding with respect to hiring from 1977 to 1982 is also precluded.

The record is devoid of the type of reprehensible conduct courts have found necessary to justify an acceleration provision for minority hiring. Protection of the

rights of non-minority workers demands that the racial goal not substantially exceed the percentage of minority group members in the relevant work force absent compelling justification. No such compelling justification exits for the selection of the 65% figure. Indeed under the present facts there is no rational reason for a racial goal to exceed the percentage of minority group members in the relevant labor pool.

IV. CONCLUSION

The consent decree at issue herein cannot be approved in its current posture. The decree fails to meet every standard of reasonableness and fundamental fairness. It is based on an evidentiary record totally bereft of any facts supporting a charge of perpetuation of a hostile environment such that class-based relief is appropriate, or indeed, that any relief beyond that already granted in this case is appropriate. The decree rests upon improper statistical data. The rights of innocent third persons are impermissibly compromised for both the short term and the duration of the decree. Based on the foregoing, on the exhibits attached hereto, on the testimony of witnesses to be presented at the fairness hearing and on the record in the case, defendant-intervenor Local 798 submits that the decree must be rejected in its entirety.

Dated: December 10, 1987.

Respectfully submitted,

DAVIS, RENO & COURTNEY

By /s/ Duane W. Reno
DUANE W. RENO

PROOF OF SERVICE BY MAIL

I declare that I am a United States citizen over the age of eighteen, not a party to the within action and that my business address is 90 New Montgomery Street, Suite 909, San Francisco, California 94105.

On December 10, 1987 I served the within Declaration of Charles H. Lee in Support Of Objections Of Local 798 To Consent Decree; Objections Of San Francisco Fire Fighters Local 798, IAFF, To Consent Decree And Specification of Evidence To Be Presented In Support Of Objections; Request For Stay Pending Appeal; and Volumes I, II and III Of Appendix To Objections Of Local 798 To Consent Decree on the following party(s) by placing a true copy thereof in the U.S. mail at San Francisco, California, fully posted and addressed as follows:

See Attachment A

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed at San Francisco, California on this 10th day of December, 1987.

/s/ Robert Millers
ROBERT MILLERS

ATTACHMENT A

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C-84-7089 MHP

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendants.

and

SAN FRANCISCO FIREFIGHTERS LOCAL 798, *et al.*, and
SAN FRANCISCO CITIZENS FOR THE MERIT SYSTEM, *et al.*,
Defendants, In Intervention.

FONTAINE DAVIS, *et al.*,
Plaintiffs, In Intervention.

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendants, In Intervention.

and

SAN FRANCISCO FIREFIGHTERS LOCAL 798, *et al.*, and
SAN FRANCISCO CITIZENS FOR THE MERIT SYSTEM, *et al.*,
Defendants, In Intervention.

STIPULATION OF UNDISPUTED FACTS

The parties through their respective counsel hereby stipulate that the following facts are undisputed:

1. The City of San Francisco ("City") is a municipal corporation existing under and by virtue of the laws of the State of California and its own charter. The boundaries of the City of San Francisco also are the boundaries for the County of San Francisco, California. The City and County of San Francisco has approximately 700,000 residents.

2. Dianne Feinstein is the Mayor of the City of San Francisco.

3. The Fire Commission of the City and County of San Francisco is empowered by the Charter of the City and County of San Francisco to manage the San Francisco Fire Department ("SFFD") and to appoint the chief of the department.

4. Emmet D. Condon is Chief of SFFD.

5. The Civil Service Commission of the City and County of San Francisco is empowered by section 3.661 of the Charter of the City and County of San Francisco to be the employment and personnel department of the City and County of San Francisco and to determine appointments to entry and promotional positions on the basis of merit and fitness as shown by the appropriate tests. The Civil Service Commission is empowered to appoint an administrative head.

6. John Walsh is the duly appointed General Manager, Personnel, of the San Francisco Civil Service Commission. He is directly responsible for recommending procedures for the selection, employment, and administration of promotional examinations for civil service employees for the City and County of San Francisco, including employees for SFFD.

7. Charles D. Cresci is the Deputy Chief of the SFFD, and he is responsible for the fire suppression operations of SFFD.

8. Chief Oliver C. Storti is an Assistant Chief of SFFD. He is in charge of the Division of Management Services. He serves as the SFFD's affirmative action officer and is the head of the Equal Employment Opportunity Unit of the SFFD.

9. The City and County of San Francisco is an employer within the meaning of Title VII of the Civil Rights Act of 1964, *as amended*.

10. The City is a unit of general local government as that term is defined in the State and Local Fiscal Assistance Act of 1972, *as amended*.

11. The City has received revenue sharing funds continuously since 1972, and it has utilized said funds in the operation of the SFFD.

12. This Court has jurisdiction under Title VII of the Civil Rights Act of 1964, *as amended*, and the State and Local Fiscal Assistance Act of 1972, *as amended*.

13. There were 1567 authorized uniformed positions in the SFFD as of June 1, 1985.

14. There were 79 Blacks in the uniformed force of the SFFD as of June 1, 1985.

15. There were 24 Asians in the uniformed force of the SFFD as of June 1, 1985.

16. There were 88 Hispanics in the uniformed force of the SFFD as of June 1, 1985.

17. There were 1380 individuals in the uniformed force of the SFFD as of June 1, 1985.

18. No female has ever been hired by the SFFD as a firefighter.

19. No female was allowed to apply for the position of H-2 firefighter or to undergo testing therefor until 1976.

20. In 1976, 313 females applied to take the written test to become H-2 firefighters; 301 qualified to take that test, and of that 301, 166 did not appear for the examination. 135 took that test, and 95 passed and 40 failed.

21. 95 females were eligible in 1976, to take the vision test, and 65 did not appear for the vision test; 5 failed the vision test, and 25 passed the vision test.

22. 25 females were eligible in 1976, to take the Physical Agility Test (PAT); 12 females did not appear for the test, and one female was not allowed to take the test because she was over the maximum age. Of the 12 females who took the test, all 12 failed it.

23. In 1970, the SFFD had approximately 1800 uniformed fire personnel, of whom four were Black. The City does not maintain records which would indicate the number of Hispanic or Asian firefighters employed at that time. The names and dates of hire of the first five Blacks employed in uniform positions on the SFFD are:

Name	Year Appointed
Earl Gage	1955
Edgar P. Bryant	1967
John Harris	1967
Audry Lee	1968
Frank Scales	1971

24. For all entry level firefighter (H-2) examinations administered by the City of San Francisco, at least since January 1971, the City has required applicants for the position of firefighter (H-2) on the SFFD to be residents of the City at the time of application and to have lived in San Francisco for one year prior to filing and continue to live in San Francisco until appointed.

25. The procedure for the employment of persons as firefighters on the SFFD at all times relevant to this action has been for the Civil Service Commission to prepare and administer a selection procedure to applicants, and to prepare an eligibility list on the basis of that selection procedure. Applicants who are placed on the eligibility list are then, on requisition by the Chief, certified to the Chief of the SFFD for appointment in order of their rank on the list; initially appointments were subject to the "Rule of One", *i.e.*, strict rank order; that procedure was amended in 1976, to permit utilization of a "Rule of Three." Certified applicants, in addition, undergo medical and background screening prior to actual appointments as firefighters.

26. For at least the period from January 1966 to January 1971, the selection procedure for the position of firefighter (H-2) used by the City of San Francisco consisted of the following:

(a) All applicants were required to be at least 5′7″ in height.

(b) All applicants were required to have a high school diploma or its equivalent, *i.e.*, G.E.D.

(c) All applicants were required to pass a written multiple choice examination, with their rank on the eligibility list based solely on the applicant's written test score and veteran's credits. The veteran's credit is 5% of the total points, *i.e.*, 50 points on a 1000 point scale.

(d) Applicants who passed the multiple choice examination were also required to pass a qualifying physical agility test and a qualifying oral interview in order to be placed on the eligibility list.

27. In the period since January 1972, appointments to the rank of firefighter on the SFFD have been made

from three eligibility lists. Those lists and their effective dates are:

List	Adopted	Duration
P-1	March 6, 1972	2 years
E-25	January 3, 1974	4 years
E-26	August 4, 1978	4 years

28. List P-1 consisted solely of persons employed by the City in the position of Fire Safety Technician (FST). Those FST's who qualified for placement on List P-1 were promoted from that position to the rank of firefighters (H-2). Lists E-25 and E-26 were entry level hiring lists, not promotion lists, and were based on examination open to residents of San Francisco who met the stated minimum qualifications.

29. Twenty-one (21) persons were appointed from List P-1 to the rank of firefighter (H-2). Of those appointed, one was White, fifteen were Black, two were Asian, one was Hispanic, and two were classified as "other non-white".

30. Four hundred and twenty-five (425) persons were appointed to the rank of firefighter (H-2) from List E-25. Of those appointed, 45 (10.6%) were Black, 37 (8.7%) were Hispanic, 13 (3.1%) were Asian and one (0.2%) was classified as "other non-white".

31. Two hundred and ninety-three (293) persons were appointed to the rank of firefighter (H-2) from List E-26. Of those appointed, 26 (8.9%) were Black, 24 (8.2%) were Hispanic, 15 (5.1%) were Asian, and two (0.7%) were classified as "other non-white".

32. The City administered a 130 question multiple choice test to applicants for the rank of firefighter (H-2) in September 1971. For that examination, the City modified the prior eligibility requirements by lowering the minimum height requirement to 5'6". The 1971 multiple choice test was to be used only as a qualifying examina-

tion, with a passing score of 70%. Ranking on the E-25 eligibility list was to be based on the physical agility test and an oral interview, with each component weighed equally.

33. The results of the September 1971 multiple choice examination were as follows:

	Tested	Passed	Pass Rates
Total:	1741		
Black:	333	61	(18.3%)
Hispanic-Asian:	221	84	(38.0%)
Other:	1187	694	(58.5%)

34. Use of the results of the September 1971 multiple choice examination was enjoined preliminarily by the United States District Court in *WACO v. Alioto*, No. C-70-1335 WTS, and the City never used those examination results in making firefighter appointments.

35. In June 1973, the City administered a 100 question multiple choice test for the position of firefighter (H-2), with candidates limited to those persons who had applied in 1971 for the position of firefighter (H-2) on the SFFD, had taken the 1971 multiple choice examination, and were still interested in the position. The City intended to use the test only on a qualifying basis, with the passing score set at 70%. The results of the multiple choice examination with that cut-off score are as follows:

	Tested	Passed	Pass Rates	Mean Score
White	394	363	(92.1%)	81.8
Black	61	41	(67.2%)	71.7
Hispanic	43	35	(81.4%)	77.7
Asian	19	17	(89.5%)	76.5
Other/Indian	7	5	(71.4%)	76.5

36. The use of the 1973 written test with a cut-off score of 70% was enjoined in the United States District Court in *WACO v. Alioto*, and a 50% cut-off score was

imposed by the District Court. At that score four (4) persons, three (3) Blacks and one (1) Asian, did not pass the examination.

37. Pursuant to an order of the United States District Court in *WACO v. Allioto*, the City made offers of employment to persons on the 1973 eligibility list (E-25) on the basis of one offer to a minority for each offer to a non-minority, regardless of rank on the list, until all minority persons had been offered employment. After all minority candidates had been offered employment under the court order, the City was permitted to and did make offers to all the persons remaining on List E-25 in order of rank.

38. The City in 1976 announced a new examination for the rank of firefighter (H-2). The selection procedure for that examination used the 1973 written multiple choice examination with a cut-off score of 70% and a weight of 40% in ranking on the eligibility list. Applicants also were required to pass a physical agility test, which was weighted 60% in determining rank on the eligibility list. Appointments from that eligibility list (List E-26) were made in rank order, pursuant to Civil Service Rule.

39. A Consent Decree was approved in *WACO* on May 18, 1977, resolving that litigation which, *inter alia*, established guidelines for the use of exam components for lists E-26 and E-27. A true copy of said decree is appended hereto.

40. The results of the 1976 written multiple choice examination for firefighter (H-2), by race and national origin, are as follows:

	Tested	Passed	Pass Rates
White	1995	1761	88.3%
Black	562	306	54.4%
Hispanic	462	319	69.0%
Asian	289	202	69.9%
Am. Ind./Other	78	54	69.2%

41. The results of the physical agility test for the position of firefighter (H-2) for List E-26 for all candidates, by race and national origin, are as follows:

	Tested	Passed	Pass Rates
White	944	538	57.0%
Black	151	78	51.7%
Hispanic	181	93	51.4%
Asian	86	43	50.0%
Am. Ind./Other	35	19	54.3%

42. In 1982, the City announced a firefighter (H-2) examination with a selection procedure to consist of a physical agility test and a written multiple choice question examination. The multiple choice examination was to be a parallel form of the multiple choice test administered by the City for the firefighter (H-2) position in 1973 and 1976.

43. The written, multiple choice examination administered by the City for the firefighter (H-2) position in 1982 for List E-27 was used with a passing score of 60%. With that passing point, the results of the test, by race and national origin, are as follows:

	Tested	Passed	Pass Rates
White	1803	1676	93%
Black	681	379	56%
Hispanic	463	321	69%
Asian	393	250	64%
Am. Ind./Other	35	26	74%

44. When the Civil Service Commission set the passing scores and weights of the PPT (PAT) on November 14, 1983 (which includes women who passed the retest) the race and national origin were as follows:

	Tested	Passed	Pass Rates
White	1334	1058	78.7%
Black	282	180	63.8%
Hispanic	245	173	70.6%
Asian	183	124	67.8%
Other	19	14	73.7%

45. In November 1983, the San Francisco Civil Service Commission, on the recommendation of its staff, established a tentative eligibility list E-27 (hereafter the "tentative E-27 list"), consisting of 1536 names plus a sublist of 74 females eligible for PPT (PAT) retest, with a proposed duration of four years, and with a ranking on the list based 70% on the candidate's PAT score and 30% on the candidate's score on the written multiple choice examination.

46. The first 500 names on the tentative E-27 list had the following composition, by race and national origin:

Rank	White	Black	Hispanic	Asian	Other
1-100	81	7	4	6	2
101-200	76	10	6	6	2
201-300	79	13	7	1	0
301-400	75	9	10	4	2
401-500	72	18	7	3	0
Total	383	57	34	20	6
	(76.6%)	(11.4%)	(6.8%)	(4.0%)	(1.2%)

47. In September 1985, subsequent to the commencement of this litigation by the United States, the San Francisco Civil Service Commission voted to adopt List E-27, with a length of 190 names and a duration of two years, with rank based solely on the candidate's PAT score. List E-27A was also issued; this list consisted solely of 18 women, 5 of whom passed the initial PAT and 13 who passed a subsequent PAT when it was administered a second time and only available for women. Only candidates who had passed the previous administered written multiple choice examination and PAT events at the originally approved passing scores were eligible to be ranked on the new Lists E-27 and E-27A.

48. The composition, by race and national origin, of the official and final List E-27 is as follows:

Rank	White	Black	Hispanic	Asian	Other
1-50	34(68.0%)	9(18.0%)	0	6(12%)	1(2.0%)
1-100	69(69.0%)	19(19.0%)	3(3.0%)	8(8.0%)	1(1.0%)
1-150	100(66.7%)	27(18.0%)	8(5.5%)	12(9.0%)	3(2.0%)
1-190	125(65.8%)	36(18.9%)	9(4.7%)	15(7.9%)	5(2.6%)

49. The composition, by race and national origin, of List 27-A is as follows:

White	13	(72%)
Black	4	(22%)
Hispanic	1	(6%)

50. The Civil Service rank structure of the SFFD in the Bureau of Fire Suppression is as follows:

Chief (H-140)
Deputy Chief (H-150)
Assistant Chief (H-50)
Battalion Chief (H-40)
Captain (H-30)
Lieutenant (H-20)
Chiefs Aide (H-10)
Firefighter (H-2)

51. All uniformed positions above the rank of firefighter are filled by promotion or by exempt appointment from within the uniformed ranks of the San Francisco Fire Department except the Chief of the Department who may be appointed from outside the ranks of the San Francisco Fire Department.

52. At all times relevant to this action, the time-in-grade requirement for eligibility for promotion to a higher rank within the SFFD has been completion of the probationary period in the eligible rank or ranks below. The probationary period on the SFFD for the rank of firefighter (H-2) is one year. The probationary period for all uniformed ranks above the rank of firefighter (H-2) on the SFFD is six months.

53. The examination procedure for promotion to the rank of lieutenant (H-20) on the SFFD prior to 1982 consisted solely of a written job knowledge examination. Rank on the lieutenant eligibility list was determined by the candidate's score on the written test and his seniority, meritorious service and "clean record" points.

54. For the lieutenant (H-20) examination administered for the SFFD in 1978, candidates could receive up to 880 points based on the written test scores and up to 120 points based upon their seniority and meritorious public service and clean record, in determining the candidate's rank on the eligibility list.

55. The examination results and appointments made, by race and national origin, for the 1978 lieutenant (H-20) examinations are as follows:

	Tested	Passed	Rates Pass	Appointed	Appt. Rate
Total	377	250		153	
White	473	226	47.8%	140	29.6%
Black	34	6	17.6%	3	8.8%
Hispanic	54	17	31.5%	10	18.5%
Asian/Other	16	1	6.3%	0	0.0%

56. Persons appointed to the rank of firefighter (H-2) on the SFFD are required to complete a training program of classroom and practical instruction in firefighting at the SFFD Fire College.

57. The SFFD Fire College classes from 1957, when the Fire College was initiated, until 1972 were composed as follows:

Class No.	Number of Men	Starting Date	Number of Weeks
1	10	4/22/57	8
2	7	6/17/57	8
3	12	8/19/57	8
4	13	4/7/58	8
5	8	7/21/58	8

Class No.	Number of Men	Starting Date	Number of Weeks
6	10	6/15/59	8
7	6	8/24/59	8
8(a)	3	2/1/60	4
8(b)	11	8/16/60	12
9	17	9/18/61	12
10	12	1/15/62	12
11	12	5/1/62	12
12	12	8/1/62	12
13	18	11/1/62	12
14	10	2/1/63	12
15	20	7/16/63	12
16	14	10/16/63	12
17	14	2/17/64	12
18	20	5/18/64	12
19	14	8/17/64	12
20	13	11/23/64	12
21	13	3/1/65	12
22	7	6/1/65	12
23	21	1/17/66	10
24	21	4/4/66	10
25	21	6/20/66	10
26	21	9/1/66	10
27	22	11/16/66	10
28	7	2/6/67	10
29	31	8/14/68	6
30	30	10/9/67	6
31	22	1/2/68	6
32	24	3/18/68	6
33	31	8/5/68	6
34	12	10/7/68	6
35	32	9/16/69	6
36	21	11/17/69	6
37	19	1/5/70	6
38	20	3/2/70	6
39	21	4/16/70	6
40	15	7/6/70	6
41	14	10/21/70	6
42	20	1/13/70	6
43	16	3/10/71	6
44	12	5/5/71	6
45	12	7/6/71	8
46	16	8/2/71	8
47	17	3/7/72	2

(FST REVIEW)

58. Classes Nos. 48 through 61 were composed as follows:

Class No.	Number of Men	Starting Date	Number of Weeks
48	48	1/21/74	8
49	48	3/25/74	8
50	48	5/28/74	8
51	41	7/29/74	8
52	45	10/15/74	8
53	48	12/9/74	8
54	17	4/7/75	8
55	24	9/3/75	8
56	17	1/26/76	8
57	24	7/5/77	6
58	24	8/15/77	6
59	24	9/26/77	6
60	12	11/7/77	6
61	9	12/27/77	7

59. Classes Nos. 62 through 72 were composed as follows:

Class No.	Number of Men	Starting Date	Number of Weeks
62	30	8/21/78	7
63	30	10/10/78	7
64	30	11/27/78	7
65	30	1/15/78	7
66	30	12/10/79	7
67	34	1/28/80	7
68	30	1/21/81	6
69	30	7/6/81	6
70	6	10/13/81	6
71	30	4/5/82	6
72	12	4/26/82	9 (3 weeks extra training)

60. Of the persons who were appointed to the SFFD Fire College in the period from 1957 up to the 48th fire class, two were terminated from the employment as fire-fighters based on their performance in the Fire College.

61. Beginning with the 48th fire class, on January 21, 1974, the SFFD substantially modified the procedures for

the evaluation of persons in the Fire College. At that time the entire program was revised to include weekly manipulative testing and a procedure was devised for the termination of failures.

62. The 48th-61st fire classes were appointed from List E-25. Of the 426 persons appointed to those classes, 11 persons, including 4 Blacks, 2 Hispanics and 5 Whites, were terminated from the Fire College. Two of the Blacks terminated and one of the Whites terminated were rehired under the provisions of the Consent Decree in *Waco* and successfully completed the Fire College.

63. The 62nd-72nd fire classes were appointed from List E-26. Of the 293 persons appointed to those classes, 4 persons, two of them Black and one of them Hispanic, were terminated from the Fire College. One additional White was terminated during his probationary period, but after he had completed the Fire College.

64. The SFFD presently intends to restrict the size of fire classes to a maximum of twenty-four persons, because its training personnel believe that a larger class size has an adverse effect on training.

65. Six hundred ninety-five (695) women applied to take the 1982 H-2 examination. One hundred ninety five (195) of those women took the written portion of the firefighter H-2 entrance exam.

66. One hundred fifty-one (151) women passed the written portion of the 1982 H-2 firefighter examination. Seventy-nine (79) women attempted the PAT in 1983, of whom five women passed. In 1984, a second opportunity was offered to all female applicants who had failed the initial 1983 PAT. Thirty-one of them retook the PAT and 13 of them passed the re-test.

67. The Civil Service Commission commissioned the YWCA to provide a physical conditioning program for

the women who had failed the 1983 PAT. After completion of this physical conditioning program, 13 women passed the minimum level of physical proficiency set for all candidates.

68. The following table sets forth the data concerning the 1982-1983 PPT (PAT) as established by the Civil Service Commission in October and November 1983. In October 1985, the Commission adopted a list, E-27, with 190 males.

	MALE	FEMALE
COMPLETED TEST	1984	79
PASSED	1531	18
PASS RATE	77%	23%

69. The use of physical test scores as the 100% controlling factor in ranking applicants for List E-27 would result in total exclusion of women from any realistic chance of being hired. The highest ranking woman on the original eligibility list would be below 1200th on the list, a position too low to be in contention for anticipated openings. All other female applicants would be even farther out of contention.

70. The San Francisco Fire Department has a separate procedure for handling complaints pertaining to racial harassment or unequal treatment which fail to allege a violation of any specific rule or regulation. This procedure is codified in San Francisco Fire Department General Order No. 85A-85 dated November 27, 1985 entitled "Equal Employment Opportunity Policy". The Civil Service Commission also has a procedure under its Rule 1.03 for handling alleged racial harassment or unequal treatment claims. Uniformed members of the San Francisco Fire Department are entitled to pursue either or both of the procedures.

71. Article No. 40, § 40[illegible] *seq.*, of the SFFD Rules and Regulation outlines the type of disciplinary action

which will be taken against a member of the SFFD who violates Department rules and regulations. The term "complaint" is used to describe the written report which is filed when an SFFD member violates a departmental rule or regulation. Complaints are investigated and disciplinary actions imposed pursuant to the guidelines laid down in Article 40. If a complaint against a member of the SFFD is found to have merit, the following types of punishment may be imposed:

1. By the Chief:

   a. Formal censure of the violator.

   b. Suspension up to ten (10) days.

   c. Filing of a formal complaint for a hearing before the Fire Commission.

2. By the Fire Commission:

   a. Reprimand.

   b. Fine not exceeding one month's salary.

   c. Suspension from the department not to exceed three (3) months.

   d. Dismissal from the department.

72. The physical agility test (PAT) used by the City for the 1982 firefighter (H-2) selection procedure consisted of seven events. Candidates were required to attain a passing score on each of the events; ranking was based on the candidates' scores on four of the events, each weighted 25%. The events and their weights were:

Hose coupling (pass/fail)
Ax swing (pass/fail)
Small hose pull (25%)
Ladder lift (25%)
Large hose pull (25%)
Ceiling hook pull (25%)
12 minute walk/run (pass/fail)

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No. 90-248

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SAN FRANCISCO FIRE FIGHTERS LOCAL 798, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO,
Petitioner,

VS.

CITY AND COUNTY OF SAN FRANCISCO, FONTAINE DAVIS, *et al.*, UNITED STATES OF AMERICA,
Respondents.

Supreme Court, U.S.
FILED
SEP 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether a consent decree settling race and gender discrimination actions which meets established "fairness" criteria, and which fits squarely within the precedents of this Court for voluntary affirmative action programs, was properly approved by the District Court.

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STATEMENT OF THE CASE

A. Proceedings Below

The petition in this case represents a last gasp challenge to a Consent Decree that brings to a close, after a eighteen year period of virtually continuous litigation, minority and female challenges to the employment practices utilized by the San Francisco Fire Department (SFFD).[1]

---

1 As stated by the District Court, "this litigation must be understood in conjunction with an earlier suit, *Western Addition Community Organization [WACO] v. Alioto, C 70-1335 WTS...*" App. to Pet. for Cert. ("Pet. App.") 31a. The first challenge to SFFD's employment practices occurred in 1970, in *Western Addition Community Organization (WACO) v. Alioto*, No. C-70-1335-WTS. It was a challenge, under 42 U.S.C. §§ 1981 and 1983, to the 1968 entry level examination. This action filed on June 24, 1970, resulted in a series of opinions that invalidated the entry level procedures for the SFFD for a period of five years. Initially, the District Court found that the challenged 1968 test had an adverse impact on minorities and had not been shown to be job related. See *WACO v. Alioto*, 330 F. Supp. 536, 539-40 (N.D. Cal. 1971).

Pursuant to the court's ruling, a new examination was developed and administered in the fall of 1971. That examination was again challenged by the plaintiffs in the *WACO* action. Once again the District Court held that the examination had adverse impact, and there was no showing that the examination was job related. The use of this examination and the resulting list of eligibles was therefore enjoined. See *WACO v. Alioto*, 340 F. Supp. 1351, 1356 (N.D. Cal. 1972).

In 1973, the District Court was again presented with the results of an entry-level examination. This examination also had adverse impact. Once more there was no showing that the examination was job related. At that point, after having been presented with three unsuccessful attempts to construct a valid entry level examination, the court ordered defendants to validate any entry level examination. See *WACO v. Alioto*, 360 F. Supp. 733, 740-41 (N.D. Cal. 1973).

Finally, in June of 1973, the District Court concluded, "The [Civil Service] Commission's dilatoriness in these matters and apparent stubborn insistence upon arguments and alternatives which this court has repeatedly found unacceptable, have created an intolerable situation . . . ." *WACO v. Alioto*, 369 F. Supp. 77, 80 (N.D. Cal. 1973), appeal dismissed as moot, 514 F. Supp. 542 (9th Cir.), cert. denied, 423 U.S. 1014 (1975). As a result, the court ordered one-for-one hiring of minorities and Whites until the list of minority eligibles was exhausted. Id. at 80-81. 2 (footnote continued on following page)

The challenged Consent Decree resolves two actions that contested long standing discriminatory hiring practices, promotional practices and terms and conditions of employment. The first case is *Fontaine Davis, et al. v. City and County of San Francisco*, No. C-84-1100 MHP, and it was filed on March 9, 1984. That action challenged the legality of the 1978 lieutenants examination, the 1982 entry level examinations, and the 1984 promotional examinations; it has only two sets of parties, plaintiffs Fontaine Davis, et al. and defendants City and County of San Francisco, et al. The challenged Consent Decree resolved all claims for relief requested in this action. Pet. App. 80a. No valid notice of appeal was ever filed with regard to this action; indeed, no party intervened in this action.[2] By order dated November 2, 1984, the District Court dismissed the part of the action regarding challenges to the entry level and promotional examinations as premature, and held the rest of the action in abeyance, including the challenge to the 1978 lieutenants examination. On November 11, 1985, the District Court reinstated this action, and on June 2, 1986, it

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The active phase of the *WACO* litigation was terminated by the entry of a consent decree on May 17, 1977. This decree acknowledged that plaintiffs had made out prima facie cases of race and national origin discrimination. It acknowledged that the City and County of San Francisco had repeatedly failed to show that the examinations were job related. It also set forth guidelines for the 1976 and subsequent entry level examinations. More importantly, the decree provided for a one year residency requirement as a prerequisite for any applicant for a position with the SFFD.

Pursuant to the WACO decree, another entry level examination was given in 1976, and that examination also had a clear adverse impact on Blacks. A challenge to the 1976 eligibles list was lodged solely under the WACO consent decree, but that challenge was rejected because the court determined that, while the examination had an adverse impact against Blacks there was no adverse impact against "minorities" in toto. WACO v. Alioto, No. C-70-1335 WTS, Memorandum and Order, June 9, 1978, p.3.

[2] Local 798 sought intervention in this action, but the District Court denied its intervention without prejudice to Local 798 seeking intervention at the remedy stage of the action on August 20, 1984. Local 798 never sought intervention in this action again.

consolidated this case with *United States v. City and County of San Francisco, et al.*, No. C-84-7089 MHP.

The second action is *United States v. City and County of San Francisco*, No. C-84-7089 MHP. This action was a classic pattern and practice action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as amended. Intervention was granted solely in the second action to plaintiff/intervenors Fontaine Davis, et al., and two defendant/intervenors.[3] Indeed, the petition before this Court springs solely from Local 798's involvement as an intervenor in this second case.[4]

Based on plaintiff-plaintiff/intervenors Fontaine Davis, et al.'s motion, the District Court enjoined the use of the 1982 entry level examination to establish a list of eligibles for the SFFD on February 12, 1986.[5] The District Court bifurcated the trial of both actions to provide that challenges to the invalidity of the 1982 entry level examination, and the 1984 lieutenant and fire inspector examinations, would be tried first in November, 1986. The other issues were to be tried at a later date. On October 23, 1986, in open court, defendants City and County, et al. conceded the invalidity of the challenged examinations, and all lists of eligibles

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[3] The second defendant in intervention, *San Francisco Citizens for the Merit System, et al.*, sought to withdraw from the action and was allowed to withdraw on May 25, 1988. Except for a couple of cameo appearances since its withdrawal from the case, it has ceased to function as a party in either of these consolidated actions.

[4] Two appeals that ostensibly challenged the Consent Decree entered by the District Court were voluntarily dismissed in the Court of Appeals for the Ninth Circuit. The United States voluntarily dismissed its appeal on January 30, 1989. Likewise, certain individual members of the San Francisco Fire Department who were not parties to either action but who claimed to be adversely affected by the entry of the Consent Decree voluntarily dismissed their appeal in the Ninth Circuit on December 5, 1988.

[5] Plaintiffs-plaintiff/intervenors later successfully moved for partial summary judgment establishing the fact of adverse impact of the 1982 entry level examination on Blacks and women.

that had been developed from the challenged examinations were subsequently cancelled.

The District Court then requested the parties to attempt to settle the actions, and when no settlement could be reached, Fontaine Davis, et al. moved for summary judgment on the issue of the validity of the challenged examinations in both actions. The United States filed a similar motion for summary judgment soon thereafter. These motions were granted on February 26, 1987. *See United States v. City and County of San Francisco, et al., Fontaine Davis, et al. v. City and County of San Francisco et al.*, 656 F.Supp. 276 (N.D Cal. 1987) Pet. App. 104a - 139a.

The District Court entered injunctive relief, and it allowed for the interim race- and gender-conscious hiring of entry level firefighters -- provided that the SFFD so requested, and the SFFD so requested. Pet. App. 130a.

The District Court set the remaining matters for trial on November 10, 1987. Prior to trial on these matters, the California Court of Appeal for the First Appellate District issued an opinion in *City and County of San Francisco v. Fair Employment and Housing Commission*, 191 Cal. App. 3d 976 (1987), *review dismissed* (8/13/87). This case established the 1978 lieutenants examination to be invalid under the California Fair Employment and Housing Act, Cal.Govt.Code § 12940 et seq. Fontaine Davis et al. had challenged said examination in its complaints, and, based on *Parklane Hosiery Company v. Shore*, 435 U.S. 322 (1979), they moved for and were granted summary judgment on this issue in open court on October 21, 1987.

The parties had been involved in settlement negotiations during this time period, and immediately before the scheduled second trial date, defendants *City and County of San Francisco et. al. and Fontaine Davis et al.* entered into a proposed Consent Decree that

would settle all of the remaining litigation[6] which was lodged with the Court.

A fairness hearing was held by the District Court on December 22, 1987, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, where testimony was allowed and over one hundred written comments were received. In a 62-page Order dated June 10, 1988, the District Court approved the Consent Decree. Local 798 and the United States filed timely notices of appeal.

On May 31, 1988, Local 798 filed a Motion with the Ninth Circuit seeking to enjoin the implementation of the Consent Decree; that requested relief was denied by unpublished Order dated July 18, 1988. Local 798 did not seek relief from this Court after that denial. On or about October 15, 1988, Local 798 filed a second request with the Ninth Circuit to enjoin the enactment of one provision of the Consent Decree. That requested relief was denied, and again Local 798 did not seek relief from this Court after the second denial of injunctive relief. On December 4, 1989, the Ninth Circuit affirmed the District Court's approval and entry of the Consent Decree. On May 9, 1990, the Ninth Circuit denied Local 798's petition for rehearing and rejected its suggestion for rehearing *en banc*.

B. Facts Justifying Entry Of The Consent Decree

SFFD has a long history of blatantly excluding minorities, especially Blacks, and women from its ranks. No Blacks were hired by SFFD prior to 1955. SFFD did not hire another Black until 1967. SFFD had only 5 Black employees until 1971. In 1972, 15 Blacks were hired to be trained to become firefighters

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6 Section VI of the Consent Decree provided for a mechanism to resolve the claims of racial harassment and other types of racial discrimination. Pursuant to that provision, the District Court heard five days of testimony; then settlement was reached for all but three of the remaining 34 claimants, and the City and County agreed to pay damages in the aggregate amount of $962,000 to 31 of those claimants.

under the auspices of a federal training program entitled the Fire Service Technicians program, but no other Blacks were hired until 1974.[7] During this period of time, the SFFD had a staffing level of 1800 uniformed firefighters.

The exclusion of women from employment opportunities in SFFD was even more blatant. Women were not even allowed to apply for positions until 1976. No woman passed the physical agility test until 1982, and, after 1982, no woman had a high enough score to be eligible for hiring. A more compelling instance of the "inexorable zero" is hard to imagine. The first women finally entered SFFD in 1987, pursuant to the District Court's order authorizing interim relief.

At the time the lawsuits were filed, SFFD employed only 79 Blacks, 89 Hispanics, 34 Asians and no women out of a work force of 1408.

In the period since 1971, the United States District Court for the Northern District of California has found that nine SFFD entry-level and promotional tests had adverse impact on minorities and/or women and that three were invalid. The California Fair Employment and Housing Commission found a lieutenants examination invalid, and the City has conceded the invalidity of four more tests. This astonishing record is so extraordinary that the District Court has referred to SFFD's "now legendary inability to devise entry-level and promotional tests that are valid under Title VII." Order Granting Injunction, Aug. 25, 1988.

Thus, from 1968 through 1982, no SFFD entry level examination has been found to be job related, although each of the examinations had an adverse impact on protected classes.

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7 The 1974 date is significant because it is the year in which the District Court, in *Western Addition Community Organization [WACO] v. Alioto*, No. C-70-1335 WTS, ordered one-for-one hiring relief. See *WACO v. Alioto*, 369 F.Supp. 77, 81.

Another entry-level examination under the auspices of the *WACO* Consent Decree was given in 1982. It also limited the candidates for this examination to residents of the City and County of San Francisco. This examination had the all too familiar outcome vis-a-vis Blacks, Asians and Hispanics. The examination had two parts, a written verbal ability test and a physical agility test. The written component had an adverse impact on Blacks, Hispanics and Asians. The physical agility component also had an adverse impact on women, Hispanics and Asians.

Plaintiffs-plaintiff/intervenors Fontaine Davis, et al. in the instant litigation challenged the 1982 entry-level examination. The District Court determined that both components of the examination had an adverse impact on protected groups and enjoined the use of the list of eligibles that those components produced. The District Court also entered summary judgment against all defendants and petitioner Local 798 with regard to this examination. That determination by the District Court was never challenged by any party.

As of November, 1987, the City had still not developed a valid entry level examination, and over 55% of all minority firefighters had been hired pursuant to the *WACO* one-for-one hiring order. Indeed, a vast majority of SFFD's current minorities have been hired based upon court-ordered procedures.

SFFD fills all promotional positions from within and that is done by examination. SFFD has 352 permanent supervisory positions, and as of the date of the District Court's opinion approving the Consent Decree, none of these positions was held by a woman, none was held by an Asian, only 4 were held by Blacks, and 16 were held by persons identified as being Hispanic. Thus, the percentage of minority participation in the supervisory ranks was less than 6%. Moreover, these minorities were concentrated in the

first level supervisory rank, H-20 Lieutenant.[8]

The first examination for a promotional position that an overwhelming majority of Blacks and other minorities were eligible to take was given in 1978. Ten Black firefighters who took the 1978 H-20 examination challenged it, alleging violations of both the California Fair Employment and Housing Act and Title VII. The California Court of Appeal for the First Appellate District sustained the California Fair Employment and Housing Commission's determination of invalidity in *City and County of San Francisco v. Fair Employment and Housing Comm'n*, 191 Cal. App. 3d 976 (1987). The Court of Appeal determined that the examination had an adverse impact on Blacks and that the City had not established that the examination was job related. *id.* at 990. That determination became final on August 13, 1987.

After this ruling, the District Court entered summary judgment establishing the invalidity of the 1978 H-20 examination on the basis of collateral estoppel. No appeal was taken from that determination.

The City administered new promotional examinations for the positions of H-20, H-30, H-4, and H-6 in 1984.[9] The results of these examinations were contested in the both of the lawsuits. At the eleventh hour, after extensive pretrial activity, the City declared in open court that it would not defend the validity of two of the 1984 promotional examinations, and the Civil Service Commission cancelled the results of the H-20 and H-4 examinations as well as the previously described entry level examination. When settlement negotiations broke down, plaintiffs in both actions

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8 The breakdown of the supervisory ranks in fire suppression at the time of the filing of the suits and entry of the Consent Decree was as follows: Chief of the Department, Deputy Chief, Assistant Chief, Battalion Chief, Captain and Lieutenant.

9 H-20 is the first level supervisor, Lieutenant; H-30 is for the second level supervisor, Captain; H-4 is the position of Fire Inspector for the Bureau of Fire Prevention; and H-6 is the position of Inspector there.

moved for summary judgment, and the District Court found that these tests had adverse impact on minorities and granted partial summary judgment on this point.

Thus, three sets of promotional examinations have been determined to have adverse impact and to be invalid under various civil rights statutes. The time period spanned the years from 1978 until the entry of the Consent Decree at issue here.

To summarize, defendants truly have a "sorry history" of test discrimination. *United States v. City and County of San Francisco*, 656 F. Supp. 276, 287. Defendants' "unenviable record of behavior reaching back nearly two decades," id., includes six entry level and three promotional tests which have been found to have adverse impact on protected groups. Three of these tests have been found invalid by the District Court, one has been found invalid by the California Fair Employment and Housing Commission, and defendants have conceded the invalidity of four others in open court. After "twenty years of indifference and failure to produce valid tests," Memorandum and Order Approving Consent Decree, Pet. App. 71a, it is no wonder the District Court labelled defendants' testing record "legendary," and that both the District Court and the Ninth Circuit determined that the entry of the challenged Consent Decree is warranted.

REASONS FOR DENYING THE WRIT

As is evident, the Consent Decree at issue is the result of years of arduous, hard-fought litigation. The relief it provides is necessitated by the City's longstanding failure "to come up with valid employee selection procedures despite court orders, an earlier consent decree and a series of promises," Pet. App. 71a, as well as the "long history and extensive facts demonstrating past discrimination," Pet. App. 77a. Because the Decree meets settled "fairness" requirements, and clearly comports with the requirements of the equal protection clause, U.S. Const. amend. XIV, § 1, as well as Title VII, petitioner's challenges to it are meritless.

Consent decrees must be found by the district court to be "fundamentally fair, adequate and reasonable." *Officers for Justice v. Civil Service Comm'n.*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied sub. nom. Byrd v. Civil Service Comm'n of City and County of San Francisco*, 459 U.S. 1217 (1983). In this instance, both the District Court and the Ninth Circuit found this Decree to satisfy this standard. Pet. App. 65a - 69a.

This Consent Decree, moreover, fits well within the substantive parameters established by this Court for an employer's voluntary adoption of affirmative, race-conscious relief. It is established that governmental entities may utilize race-conscious remedies needed to correct past and present discrimination, *United States v. Paradise*, ___ U.S. ___, 107 S. Ct. 1053 (1987), but that a municipality's affirmative action plan must pass both constitutional and Title VII muster, *Local 93, Int'l Assn. of Firefighters v. City of Cleveland*, 473 U.S. 501, 517 n.8 (1986).

From the standpoint of the equal protection clause, the remedial purpose of the Decree is one in which "[t]he government unquestionably has a compelling interest," *Paradise*, 107 S. Ct. at 1065. In equal protection analyses of voluntary affirmative action programs, this Court has looked to whether there exists "a strong basis in evidence . . . that remedial action was necessary." *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 277 (1986)

(plurality opinion of Powell, J.). Here, where all Department hiring is entry-level and non-skilled, this "strong basis in evidence" or "firm basis" test may be met by proof of statistical imbalances sufficient to make out a Title VII prima facie discrimination case, see, e.g., *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring); *City of Richmond v. J. A. Croson Co.*, ___ U.S. ___, 109 S. Ct. 706, 725 (1989); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977). Here, as the District Court found and the Ninth Circuit affirmed, the stark statistical disparities described above provide the requisite showing. Pet. App. 70a. Along with the City's "legendary" inability to promulgate lawful testing procedures and its failure to correct the racially hostile environment in the Department, these disparities certainly satisfy the "strong basis in evidence" test.

Moreover, under the analysis established in *Paradise*, the Consent Decree is "narrowly tailored" to its purposes. The record amply demonstrates that the affirmative relief the Decree provides is plainly necessary; the "sorry" history of the Department's inability to correct its longstanding legacy of discriminatory testing provides no alternative. As the District Court noted:

> Affirmative remedies are required because the City has proved unresponsive to its duties under Title VII and the injunction of this court to come up with valid employee selection procedures. Affirmative race-conscious relief is the only effective means to assure the enjoyment of equal employment opportunity and to prevent further delays by the City. [Citations omitted.]

Pet. App. 70a. Furthermore, the terms of the Decree are highly flexible, as they set no quotas for affirmative hiring, only goals expressly contingent upon the availability of qualified personnel. See, e.g., Pet. App. 68a, 74a, 76a, 83a. The Decree is temporary; as amended by the Court of Appeals, it will terminate as soon as its purposes have been attained, but in any event no later than seven years from its entry. Pet. App. 16a. Its long-term hiring goals are tied to the proportion of minorities in the San

Francisco work force, Pet. App. 82a - 83a, with a slightly higher short-term hiring rate of the sort previously upheld by this Court, see *Paradise*, 107 S. Ct. at 1071. Lastly, the Decree does not unacceptably burden innocent third parties; indeed, far from requiring that non-minorities be laid off or barring their advancement, the Decree has already resulted in 36 promotions (out of the 81 total authorized by the Decree) for White males. Pet. App. 18a.

Likewise, for many of the same reasons, the Consent Decree fulfills the requirements of Title VII. The statistical disparities within the Department with respect to minorities and women bear out the "manifest imbalance" required of voluntary affirmative action programs by *Johnson v. Transportation Agency, Santa Clara County*, ___ U.S. ___, 107 S. Ct. 1442, 1451-52 (1987). And, under the standards first set out in *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979), the Decree neither "unnecessarily trammels" the interests of non-minority employees or absolutely bars them from job opportunities, nor is it intended to maintain a racially balanced workforce. As to the first of these considerations, the Decree most assuredly did not mandate "the discharge of white workers and their replacement with new black hires," *id.*; moreover, because the examinations at issue were invalid, no "legitimate firmly rooted expectations" as to hiring or promotion could have been disturbed, *Johnson*, 107 S. Ct. at 1455. And, as already explained, White male firefighters have been benefitted by the promotions provided for by the Decree, and remain eligible for future promotions as well. As to the second of the concerns posed in *Weber*, the Decree's temporary nature proves that it is not aimed at maintaining a particular racial balance.

As a threshhold matter, this Court should not grant the requested writ because, regardless of the outcome of this action, the Consent

Decree at issue would still be enforced and enforceable.[10] Action by this Court would be analogous to a situation in which adequate state grounds existed, and thus one in which the Court would in effect be rendering an advisory opinion. *See*, e.g., *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1954) (Court will not review state court judgments resting on adequate and independent state grounds; if same judgment were subsequently rendered by state court after Court corrected its views of federal laws, Court review could amount to no more than advisory opinion); see also *Fay v. Noia*, 372 U.S. 391, 428-30 (1963).

In addition, another preliminary consideration lies with petitioner's apparent central concern – the promotion of individuals to the rank of lieutenant pursuant to the Consent Decree. Since the entry of the Decree on June 10, 1988, all but one of these lieutenants have become permanent for all purposes in the Department. Thus, action by this Court could upset the supervisory structure of the Department. Indeed, such action would be palpably unfair and inequitable where it would impact upon incumbents. *See Romasanta v. United Airlines, Inc.*, 717 F.2d 1140 (7th Cir. 1983) *cert. denied*, 466 U.S. 944 (1984) (retroactive seniority denied because of adverse impact on incumbents and members of protected classes); *Brieseno v. Central Technical Community College Area*, 739 F.2d 344 (8th Cir. 1984) (reinstatement denied where would affect incumbent); cf. *Spagnuolo v. Whirlpool Corp.*, 717 F.2d 114, 119 (4th Cir. 1983) (reinstatement order reversed under ADEA because it would require displacement of innocent incumbent).[11]

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10 As set forth above, no party successfully intervened in the *Fontaine Davis, et al. v. City and County of San Francisco* No. C-84-1100 MHP action. Therefore, there is and can be no challenge to the Consent Decree in that matter. It is axiomatic that only a party may appeal from a judgment or order of the district court, *see* Stern, *Appellate Practice in the United States* (2d ed.) 74 (1989).

11 Similarly, this case may be considered to be moot. The appointment of the 81 lieutenants under the Consent Decree in essence moots out petitioner's contentions. This is a facial attack on a consent decree; it is not a case where

Petitioner's specific contentions are addressed separately below.

I. The Court Of Appeals Applied The Proper Standards Of Review, Including Strict Scrutiny Analysis, To The District Court's Approval Of The Consent Decree.

Petitioner disingenuously would persuade this Court that the Ninth Circuit failed to apply "strict scrutiny" analysis in its approval of the Consent Decree, as required by *Croson*, 109 S. Ct. at 719-20. This assertion, however, is not only meritless; it is deceptive.

In its carefully structured opinion, the Court of Appeals first considered the "fairness" aspect of the Consent Decree -- i.e., the standard of review applicable under Fed.R.Civ.P. 23(e) pertaining to the settlement of class actions.[12] Citing to Officers for Justice, the Court noted that the District Court must find the proposed settlement to be "fundamentally fair, adequate and reasonable." It also observed that the District Court's approval may only be reversed given "a strong showing that [such approval] was a clear abuse of discretion." Pet. App. 9a - 10a.

Having concluded that the District Court did not abuse its discretion in finding the Consent Decree to be fair, the Court of Appeals then proceeded to the "constitutional and statutory considerations" step of its legal analysis, finding that the Consent

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there have been complaints that petitioner has been discriminated against. Instead, petitioner seeks to attack the race- and gender-conscious remedies afforded in the Consent Decree. Thus, there is no question of there being any continuing remedy to be provided to petitioner. A more appropriate challenge to the alleged discriminatory impact of the Consent Decree is presently before the United States District Court for the Northern District of California in an action styled *Ronald J. Van Pool, et al. v. City and County of San Francisco, San Francisco Fire Department, and the Civil Service Commission of the City and County of San Francisco, No. C-89-4304 MHP.*

12 Fed.R.Civ.Pro. 23(e) provides in relevant part that "[a] class action shall not be dismissed or compromised without the approval of the court."

Decree met the "strict scrutiny" test required by the equal protection clause.[13] Pet. App. 11a - 16a. Indeed, the Court of Appeals' step-by-step equal protection analysis cited with approval the District Court's finding of a "compelling governmental purpose" behind the City's adoption of the Decree. Pet. App. 12a. Further, it specifically found there was sufficient evidence to justify the relief granted and that, with the exception of the fixed seven-year duration of the Consent Decree, the Decree was "narrowly tailored" to meet its remedial purposes. Pet. App. 13a - 16a.

The undisputed record therefore makes plain that the Court of Appeals did independently apply a strict scrutiny analysis in affirming the District Court's approval of the Consent Decree. Thus, the question presented by petitioner to this Court is wholly illusory and undeserving of review.

II. Even If The Question Of The Relevant Labor Market Were Appropriate For Decision By This Court, It Is Undisputed That The City And County Of San Francisco Was The Department's Labor Market During The Period In Question, And Therefore The District Court Correctly Used It As Such.

It is well-settled that, ordinarily, this Court does not decide questions not raised or involved in the lower court. *See*, e.g., *Duignan v. United States*, 274 U.S. 195, 200 (1927) ("It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed"); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (Court refused to consider question raised in petition for certiorari but not before Court of Appeals); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981) (question not raised in Court of Appeals not properly before the Court). Exceptions to this rule will be made only in unusual situations, such as where an error if not reviewed

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13 At this point in its opinion, the Court of Appeals also found the Consent Decree to fall within the requirements for voluntary race-conscious remedies under Title VII. Pet. App. 17a - 19a.

would "seriously affect the fairness, integrity or public reputation of public proceedings," *Connor v. Finch*, 431 U.S. 407, 421 n.19 (1977), or where a change in controlling law has occurred after the filing of a petition for certiorari, see, e.g., *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 896 n.7 (1984), or where the respondent has not objected to its decision and the issue is properly raised in another petition for certiorari currently pending before the Court, *see Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980).

As is clear from the briefing before the Court of Appeals, all parties including petitioner took it as assumed that the relevant labor market for statistical comparisons was that of the City and County of San Francisco.[14] This is hardly surprising given the undisputed fact that, as the District Court pointed out in its June 10, 1988 order, "[r]esidence in the City has always been a prerequisite for employment in the SFFD . . ." Pet. App. 71a. As such, this issue was neither joined below nor considered by the court below.

In any event, petitioner's citations to *Hazelwood; Wards Cove Packing Co. v. Atonio*, ___ U.S. ___, 109 S. Ct. 2115 (1989); *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987); *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1984); and *Hammon v. Barry*, 826 F.2d 73 (D.C.Cir. 1987), lend it no support. These cases simply stand for the well-established proposition that the proper labor market for comparison is that which the employer actually utilized. As noted above, it has never been disputed in this litigation that, at all relevant times, there was a San Francisco residency requirement for applicants for positions in the Department.

Petitioner cites *Cooperrider v. San Francisco Civil Service Comm'n*, 97 Cal. App. 3d 495 (1979), in support of its assertion that the San Francisco "standard metropolitan statistical area" is the

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14 *See*, e.g., Appellant's Opening Brief at 41-42; Brief of Appellee City at 20 and 28; and Brief of Appellees Davis, et al. at 24 and 46-47.

proper labor market for comparison purposes, despite the fact that a San Francisco residence requirement has historically applied to Department applicants.[15] As is readily apparent, however, petitioner in effect asks this Court to adjudicate the wholly separate and fact-bound issue of whether the Department's ongoing residency requirement is unlawful as claimed. This Court should decline that invitation.

Because this question was not raised in the court below, because the applicable law is settled, and moreover, since it is undisputed that the City and County of San Francisco was in fact the labor market from which applicants came during the relevant time periods, this question is not appropriate for review by this Court.

III. The Consent Decree On Its Face Requires That Only Qualified Firefighters Be Hired Or Promoted.

Petitioner baldly asserts that the Consent Decree required or permitted the promotion of "unqualified" individuals to the rank of lieutenant "based upon the scores achieved by these firefighters on an admittedy [sic] invalid examination [i.e., the 1984 lieutenant's examination]." Pet. for Cert. 21. This contention is misleading and specious, and does not merit review by the Court.

On its face, the Consent Decree states:

> The hiring and promotional objectives set forth herein are goals rather than quotas. Nothing herein shall be interpreted to require the hiring or promotion of unqualified persons.

Pet. App. 83a. Moreover, in its Memorandum and Order approving the Decree, the District Court noted that its goals "are

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15 The Ninth Circuit recently upheld the affirmative action plan of another California municipality that used an identical city residency requirement. *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987), *cert. denied*, ___ U.S. ___, 109 S. Ct. 1310 (1989).

expressly subject to the availability of qualified applicants," Pet. App. 68a; that "[p]ast performance and work history will also be considered in making the promotion decision," Pet. App. 74a; and that "[a]ll candidates must be qualified; the decree does not mandate, nor does it permit, blind hiring." Pet. App. 76a. Consistent with this, counsel for the City assured the District Court at the December 22, 1987 fairness hearing that the Department would undertake an

> [i]ndependent assessment of each of the persons who are promoted pursuant to the decree and will promote only those persons who are found to be qualified based upon an assessment of their work histories . . . their performance evaluations and so on.

Transcript of 12/22/88, Fairness Hearing at 32:9 - 14. Because the Department subsequently determined that all but one of the firefighters promoted to lieutenant pursuant to the Decree were qualified by virtue of successfully completing the longstanding probationary requirements, petitioner's contention is patently incorrect.

At bottom, petitioner's challenge relies solely on the unfounded assumption that promotional decisions must be made on the basis of competitive examinations -- even in preference to supervisory evaluations and other work records. This assumption is of course erroneous. Particularly since the 1984 lieutenants examination was only one of many factors considered, and was never used to establish a right to promotion, the question presented simply does not arise in this case.

Lastly, petitioner's claim that even the carefully limited use that was made of the 1984 examination somehow irreparably infected the promotional decisions that were reached ignores the fact that the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1 et seq. (1989), provide that the invalidity of a selection device is remedied by utilizing it in a manner that counteracts its unlawful discriminatory effect. 29 C.F.R. §§

1607.3B, 1607.5G (1989). In the instant case, where those minority applicants who scored higher on the examination than others of their racial group simply gained some advantage in their individualized, multi-factored promotional decisions, petitioner can hardly argue that those eventually chosen for promotion were either unqualified or invalidly selected.

Because this question rests on questionable assertions of fact and, moreover, involves no substantial issue of law, it does not merit this Court's review.

IV. The District Court Properly Approved The Consent Decree's Provision Of Affirmative Relief And, Consistent With This Court's Precedents, Such Relief Does Not Maintain Racial Or Gender Balance Within The Fire Department.

Petitioner relies on the District Court's statement in its February 26, 1987 order that the injunctive relief contained therein would not include affirmative race- or gender-conscious remedies, Pet. App. 128a - 129a, for the proposition that the affirmative relief later afforded by the Consent Decree is unlawful. This reliance is entirely misplaced, as it rests on a fundamental misapprehension of this Court's clear precedents on this point.

Leaving aside petitioner's seriously mistaken assertions as to the extent of unremedied discrimination within the Department prior to entry of the Consent Decree,[16] it is settled that consent decrees

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16 *See, e.g.*, the Court of Appeals' discussion of the inadequacy of the relief resulting from the *WACO* litigation, Pet. App. 13a - 14a. In this connection, petitioner appears simply to argue its disagreement with the factual findings of the courts below on this point. However, it is the established practice of this Court that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). Review should not be granted on the basis of petitioner's fact-bound contention without an "obvious and exceptional" evidentiary showing plainly lacking here.

may provide broader relief than that which the court could have awarded after trial. *Local 93*, 478 U.S. at 525-26.

Consistent with *Local 93*, it is apparent that the District Court's statement in its February 26, 1987 order as to the scope of permissible relief was made in the context of the involuntary injunctive relief it ordered on that occasion.[17] The court did not purport to assess the appropriateness of affirmative relief within the framework of a voluntarily adopted consent decree, since that was not the question before it that day.[18] Indeed, in its June 10,

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17 Indeed, it is clear that the District Court was using the "persistent or egregious discrimination" standard applicable to court-ordered affirmative relief enunciated in *Local 28 of Sheet Metal Workers Int'l Assn. v. EEOC*, 478 U.S. 421, 445, 475-76 (1986). What is more, as the District Court noted, by the time the Consent Decree came before the court for approval the record had been augmented with additional evidence of racial harassment that had occurred since the court's previous order, see, e.g., Pet. App. 70a.

18 Petitioner states that "[t]he District Court specifically recognized in its order of February 26, 1987, that the City's abandonment of the 1982-83 entry-level examination and the 1984 promotional examinations eliminated any claim by the females and minorities who took those examinations that they had been denied individual employment opportunities in violation of Title VII." Pet. for Cert. 23 - 24. This is a significant misrepresentation of the District Court's order. The order was in response to plaintiff-intervenors' motion for partial summary judgment based on the City's cancellation of those examination procedures. Pet. App. 105a - 106a. Plaintiff/intervenors had argued that the cancellation of the examinations itself denied minority and women applicants employment opportunities and perpetuated past discrimination. *See, e.g.*, Pet. App. 116a - 123a. Thus, petitioner's semantic attempt to portray the District Court as concluding that plaintiff/intervenors' claims of discrimination had been "eliminated" is patently flawed. Indeed, the court specifically addressed this contention:

> Certain of the defendants suggest as a threshold consideration that since the City voluntarily withdrew the examinations prior to any use for hiring purposes, the absence of a discriminatory result must preclude any finding of illegal activity and thus bar the award of relief.

(footnote continued on following page)

1988 Memorandum and Order approving the Decree, the court specifically distinguished between the two forms of remedies. Pet. App. 70a.[19]

Moreover, contrary to petitioner's suggestion, the evidence of discrimination before the District Court more than justified the affirmative relief contained in the Consent Decree, consistent with the standards set out by this Court in *Johnson and Wygant*. *Johnson* held that employers implementing voluntary affirmative action plans "need point only to a 'conspicuous . . . imbalance in traditionally segregated job categories'" in order to satisfy Title VII concerns. *Johnson*, 107 S. Ct. at 1451. Likewise, *Wygant* established that a "strong basis in evidence" may justify such voluntary policies on equal protection grounds. *Wygant*, 476 U.S. at 277-78. The District Court as well as the Court of Appeals found that both of these tests had been met by the Consent Decree. Pet. App. 14a - 15a, 17a and 70a.

Petitioner also intimates that the affirmative relief provided by the Consent Decree is designed to permanently maintain, rather than simply attain, racial and gender balance within the Depart-

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Pet. App. 124a. Rejecting this assertion, the District Court went on to enjoin the City, inter alia, from unlawfully discriminating against employees or applicants with the Department, and from using any tests that had adverse impact against protected groups. Pet. App. 131a. The court also noted that whether or not the cancellation of the examinations "averted the infliction of compensable injuries" on applicants was a question that could only be resolved at trial. Pet. App. 125a. Thus, petitioner's suggestion that the District Court found plaintiff-intervenors' claims to have been "eliminated" is misleading and entirely fallacious.

19 For this reason, petitioner's reliance upon *Local 28* is misplaced. As has been previously noted, *Local 28* involved affirmative, race-conscious relief that was imposed upon the employer by the court, not a voluntarily-established plan. Even assuming arguendo that the affirmative relief here had been court-imposed, however, such relief would have been amply justified. See *Paradise*, 107 S. Ct. 1053 (court-ordered, race-conscious promotion requirements permissible where employer had consistently failed to comply with consent decrees and court orders to remedy past discrimination).

ment. However, the simple facts that the Decree has a temporary, limited duration, *see, e.g., Johnson*, 107 S. Ct. at 1456, and that the promotional remedies petitioner complains of here are of a "one-time" nature, make the inaccuracy of this claim obvious.[20]

Because petitioner's question presents no unresolved issues of law, review thereof by this Court is unnecessary.

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20 Notwithstanding the above, as it is undisputed that labor force parity has not been attained by the Department in any job category, the claim that the Consent Decree would function to maintain such parity is unripe and non-justiciable.

CONCLUSION

For all of the reasons set forth above, the petition for writ of certiorari should be denied.

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(3)

No. 90-248

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

SAN FRANCISCO FIRE FIGHTERS LOCAL 798,
INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, AFL-CIO,
Petitioner,

VS.

CITY AND COUNTY OF SAN FRANCISCO,
FONTAINE DAVIS, *et al.*,
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION RESPONDENT CITY AND COUNTY OF SAN FRANCISCO

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No. 90-248

In the Supreme Court

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OCTOBER TERM, 1990

SAN FRANCISCO FIRE FIGHTERS LOCAL 798,
INTERNATIONAL ASSOCIATION OF
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VS.

CITY AND COUNTY OF SAN FRANCISCO,
FONTAINE DAVIS, *et al.*,
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION RESPONDENT CITY AND COUNTY OF SAN FRANCISCO

Respondent City and County of San Francisco ("City") respectfully requests that this Court deny the Petition for Writ of Certiorari filed by petitioner San Francisco Fire Fighters Local 798, International Association of Fire Fighters, AFL-CIO ("Local 798").

STATEMENT OF THE CASE

After protracted litigation, the City and County of San Francisco entered into a consent decree to resolve two decades of successful state and federal challenges to the hiring and promotional practices of its Fire Department. This history is marked by findings that the Department had repeatedly used selection procedures in violation of civil rights laws and court orders. Faced with unassailable evidence of discrimination in the most recent examinations and the prospect of a trial raising numerous claims of racial hostility and harassment throughout the Department, the City agreed to a comprehensive settlement to eradicate the effects of longstanding practices and avoid the imposition of more drastic relief.

The evidence which induced the City to settle the action justified and informed the Decree's narrowly tailored affirmative relief. Petitioner's statement of the case, however, does not fully or accurately recount these facts.

Background

Twenty years ago, the NAACP and two other organizations filed a lawsuit challenging the Fire Department's 1968 entrance examination. In *Western Addition Community Org. [WACO] v. Alioto*, 330 F.Supp. 536 (N.D. Cal. 1971), the District Court held that the plaintiffs had established a *prima facie* case of unlawful discrimination. The examination had severe adverse impact toward minorities, and the City conceded that the test was not reasonably connected to the job's requirements.

In 1971, the City administered a modified entrance examination. Again, the results showed adverse impact toward minorities. The District Court found that the City had not performed the basic analysis necessary to justify the examination and enjoined the Department from using the results. *Western Addition Community Org. [WACO] v. Alioto*, 340 F.Supp. 1351 (N.D. Cal. 1972).

The City submitted a third entrance examination for review in January 1973. The District Court found that the City failed to validate the examination in accordance with federal guidelines.

The Court admonished the City "to seriously, rather than superficially and speciously, face up to the problem presented to it." *Western Addition Community Org. [WACO] v. Alioto*, 360 F.Supp. 733, 739 (N.D. Cal. 1973). The Court issued an order limiting the use of the written test and directing the City to conduct empirical validation of its selection procedures. *Id.* at 740.

In November 1973, the District Court found that the City had failed to carry out the order issued earlier that year. *Western Addition Community Org. [WACO] v. Alioto*, 369 F.Supp. 77 (N.D. Cal. 1973), *appeal dismissed as moot*, 514 F.2d 542 (9th Cir.) (*per curiam*), *cert. denied*, 423 U.S. 1014 (1975). Noting the City's "dilatoriness . . . and apparent stubborn insistence upon arguments and alternatives which this court has repeatedly found unacceptable," the District Court granted affirmative relief. 369 F.Supp. at 80. The Court ordered the City to hire one minority for every non-minority hired until the list of qualified minorities was exhausted.

The specific challenges to entry-level hiring raised by the WACO plaintiffs were resolved by a consent decree in May 1977. *See United States v. City and County of San Francisco*, 696 F.Supp. 1287, 1292 (N.D.Cal. 1987), *aff'd as modified, Davis v. City and County of San Francisco*, 890 F.2d 1438 (9th Cir. 1989) (Petitioner's Appendices [Pet.App.] p.37a). The entry examination administered pursuant to this decree produced adverse impact, but the District Court upheld the results because the City had complied with the express terms of the settlement. 696 F.Supp. at 1293 (Pet.App. p.39a). The WACO decree expired in 1982. *Id.*

The WACO litigation concerned only discrimination against minority males in entry-level hiring. The first challenge to promotional practices in the Fire Department occurred in 1980. Black firefighters filed complaints with the California Fair Employment and Housing Commission (FEHC) alleging that the 1978 lieutenant examination discriminated on the basis of race. (Lieutenant is the first promotive rank in the Fire Department, and all entry level firefighters who have completed one year in service are eligible to take the examination.) In a challenge under Califor-

nia's Fair Employment and Housing Act (Cal. Gov. Code §§ 12900 *et seq.*), the California Court of Appeal held that the examination had adverse impact toward Blacks. *City and County of San Francisco v. Fair Employment and Housing Comm'n*, 191 Cal.App.3d 976, 989 (1987). Applying the standards developed for Title VII of the Federal Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*) to the state anti-discrimination statute, the appeals court held that the City had not justified the examination as a valid, job-related selection device. *Id.* at 991.

Because the City had made appointments from the 1978 exam results, the FEHC ordered the immediate promotion with back pay of four Black firefighters. The FEHC also ordered the City to promote six other Black firefighters to the position of lieutenant within one year and appoint one Black for every five non-minorities until valid selection procedures for the rank of lieutenant had been established. *Id.* at 982. The California Court of Appeal, however, refrained from ordering such relief pending the outcome of the current federal litigation.

> The federal court has signaled its intention to assure the expeditious development of valid entry-level and promotional examinations, to preclude the reinstitution of previous discriminatory employment practices, and to ensure that lawful employment procedures are instituted in the future. We have confidence that the federal court is in the best position to order broad prospective relief. Therefore, the imposition of accelerated promotional goals or other action to eradicate the effects of past discrimination should be left to the federal forum.

Id. at 993. In approving the consent decree, the District Court held that the Court of Appeal's decision had preclusive effect. 696 F.Supp. at 1294 (Pet.App. p.41a).

Current Litigation

Following the expiration of the WACO consent decree, the Fire Department administered new entry-level hiring procedures in 1982. The Department gave a new test for lieutenant in 1984, while the FEHC litigation over the 1978 lieutenant examination

continued in state court. After the City published the results of the 1982 entry examination, the United States brought an action against the City alleging that the test had an adverse impact on Blacks, Asians and Hispanics. Plaintiff-intervenors, comprising various individuals and organizations, brought a separate action alleging that the hiring and promotional procedures discriminated against minorities and women. (Women, who were not included in the WACO litigation, were prohibited from employment in the Fire Department until 1976.) Plaintiff-intervenors also sought monetary and injunctive relief to redress historic patterns and practices of racial discrimination at all levels in the Department. The two cases were consolidated in 1986.[1]

In February 1986, the Court enjoined the City from proceeding with its plans to immediately hire entry-level firefighters based on the results of the 1982 examination.[2] In June 1986, the Court granted partial summary judgment finding that the 1982 entry-level hiring procedures had an adverse impact on Blacks and women. Following intensive discovery, the parties filed a joint pretrial statement declaring as undisputed the adverse impact of

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[1] Petitioner states that a proposed consent decree between the City and the United States was withdrawn because of opposition from the City's Board of Supervisors. Petitioner implies that some members of the Board exerted political pressure in favor of preferences for minorities. Nothing in the record will bear out this suggestion. A settlement with the United States would not have resolved the claims alleging discrimination toward women in hiring and toward minorities in promotions. Nor would such a settlement resolve plaintiff-intervenors' claims of pervasive, egregious discrimination within the Department. A comprehensive settlement of all claims represented the best use of the City's resources.

[2] Petitioner suggests that the City never intended to use the results of the examinations in question, suggesting a conspiracy with plaintiff-intervenors. Pet. pp.3-4. This is contrary to the facts. As the District Court noted: "In the case of the 1982 H2 appointment list, the City's intent to imminently consummate its concededly discriminatory employment procedure was thwarted only by order of this court preliminarily enjoining the use of the test for any hiring purpose." *United States v. City and County of San Francisco*, 656 F.Supp. 276, 287 (N.D. 1987).

the 1982 entry-level selection procedures on Hispanics, Asians and women. The parties also agreed that the 1984 lieutenant examination had an adverse impact on minorities.

After what the District Court termed "two years of tenacious and uncompromising pretrial litigation in defense of the challenged examinations," the City conceded that it could not defend the examinations' validity. *United States v. City and County of San Francisco*, 656 F.Supp. 276, 281 (N.D. Cal. 1987) (Pet.App. p. 113a). On February 26, 1987, the District Court granted partial summary judgment, holding that the clear adverse impact of the unvalidated examinations constituted a violation of Title VII. The District Court rejected the City's contention that withdrawal of the challenged examinations would moot any claim for injunctive relief.

> [T]he City has only deepened cause for concern by conceding that it has failed once again to develop valid employment procedures for hiring and promotions within the Fire Department, thus adding yet another chapter to an unenviable record of behavior reaching back nearly two decades. For the court to ignore the [Fire Department's] consistent and ongoing inability to utilize nondiscriminatory employment procedures, and to decline to enter judgment and award injunctive relief to assure that this sorry history will finally come to an end, would be inexcusable.

Id. at 287 (Pet.App. p. 125a). In the order (hereinafter "the 1987 order"), the Court enjoined the City from using any selection procedure for hiring or promotion that produced adverse impact unless the procedure could be validated in accordance with federal guidelines. The Court further enjoined the City to conduct an aggressive recruitment campaign for minorities and women, and to cooperate with all parties in the development of valid examinations. To avert a firefighting crisis, the Court permitted the City to make interim appointments from the results of the entry-level examinations. The City was directed to make these provisional appointments to reflect the minority and female proportions of the applicant pool. *Id.* at 289-293 (Pet.App. pp. 131a-139a).

The 1987 order was limited in two important respects. First, the District Court refrained from ordering relief with regard to promotions pending the outcome of the FEHC proceedings over the 1978 lieutenant examination. Second, the Court postponed until trial the question of affirmative relief to remedy the effects of past discrimination.

> This determination must be left to trial, when the court will have before it the full range of relevant evidence regarding the [Fire Department's] satisfaction of the WACO consent decree's objectives. [footnote omitted] In light of this resolution, the court need not reach the subsequent question of whether the administration and cancellation of the examinations impermissibly perpetuated the effects of prior discrimination in a manner violative of Title VII. The court observes, though, that this determination is also more appropriately left to trial, when the court can consider the [entry-level and promotional] examination procedures in the broader context of plaintiff-intervenors' pattern and practice allegations.

Id. at 286 (Pet.App. p. 123a).

The Consent Decree

The 1987 order left for trial the plaintiff-intervenors' allegations that the Department had tolerated a pervasive, racially hostile environment. A trial featuring considerable evidence in support of these claims would have had a devastating effect on firefighters' morale and public confidence in the Department. The City was also aware that the Court could order sweeping remedial actions if the plaintiff-intervenors prevailed. Therefore, the City elected to resolve the action through a comprehensive settlement.

The consent decree reflects the manifold challenges to the employment practices and work environment of the Fire Department. The decree requires training in human relations and mediation to prevent racial harassment. The decree also establishes a new mechanism for investigating and punishing persons who perpetuate racial harassment. The decree incorporates the provisions of the 1987 order requiring the development of valid entry-level and promotional examinations. The decree requires the administration of these examinations on a schedule designed to

ensure rapid employment and promotional opportunities for both minorities and non-minorities. 696 F.Supp. at 1313-1318 (Pet.App. pp. 82a-94a).

The consent decree specifies hiring goals "in order to eradicate the present effects of past employment practices with respect to minorities and women." *Id.* at 1313 (Pet.App. p. 82a). The nature of these goals is clearly defined. "The hiring and promotional objectives set forth herein are goals rather than quotas. Nothing herein should be interpreted to require the hiring and promotion of unqualified persons." *Id.* The City agreed to hire five hundred firefighters during the life of the decree. The consent decree repeats the goal of the WACO decree to raise minority representation to forty percent to reflect the percentage of minorities in the City's applicable labor pool. The decree also projects as an objective that women will make up ten percent of the firefighting force at the conclusion of the consent decree. For each entrance examination, the overall hiring goals for women and minorities are ten and fifty-five percent, respectively. *Id.* at 1314 (Pet.App. p. 84a). The flexible nature of these targets is underscored by a provision that permits the City to justify any departures by showing that a failure to meet a goal was a result of a lawful selection procedure. *Id.*

To remedy the effects of discrimination in past promotional procedures, the consent decree mandates that six Black firefighters who had successfully challenged the 1978 lieutenant examination would be retroactively promoted. Because these individuals were deprived of the opportunity to compete in the 1984 examination for the next promotive rank of captain, they would receive a "make-up" examination. The decree directs the City to integrate the results of this examination with the results of the 1984 captain examination. *Id.*

The promotion of the six Black firefighters to the rank of lieutenant did not, however, resolve the pending challenges to the 1984 lieutenant examination. Because of a chronic shortage of lieutenants and the possibility that the Court would order drastic affirmative action after a finding of deliberate discrimination, the City agreed to promote twenty-seven minority firefighters immediately from the results of the 1984 lieutenant examination. The

City also had the option to appoint forty-eight additional lieutenants; twenty-five percent of these promotions were targeted for minorities. *Id.* at 1316 (Pet.App. p. 89a).

Court Approval

The District Court applied two standards in analyzing the decree. First, the Court determined whether, pursuant to Fed. R. Civ. Pro. 23(e), the settlement of the class action was "fundamentally fair, adequate and reasonable." *Id.* at 1300 (Pet.App. p. 55a). The Court considered "objections filed by individual firefighters and members of the public." *Id.* at 1305 (Pet. App. p. 65a). Local 798's challenges were treated separately in the Court's analysis of the decree's implications for Title VII and equal protection. *Id.* Many objections to the decree's fairness focused on the promotion of minority firefighters from the results of the 1984 examination. The Court specifically modified the decree to ensure that only qualified firefighters would receive the promotions. "Race will be only one consideration among others, including each candidate's work history and performance evaluations." *Id.* at 1306 (Pet.App. pp. 67a-68a). With this change, the Court found that the decree was a fair settlement of the class action.

The Court next turned to the constitutional and statutory challenges to the decree's race-conscious remedies. The Court applied the most stringent analysis required of affirmative action programs: Whether the decree was narrowly tailored to remedy a pattern and practice of discrimination in hiring and promotion on the basis of race and sex. *Id.* at 1301 (Pet.App. p. 57a). The Court found a firm basis in the evidence to justify affirmative action. The undisputed evidence supported a *prima facie* case of discrimination in violation of Title VII. The Court held that merely enjoining the City to comply with the law would be inadequate in light of the City's repeated failures to implement lawful hiring and promotion procedures and the "significant evidence regarding racial harassment." *Id.* at 1307-08 (Pet.App. p. 70a). "Affirmative race-conscious relief is the only effective means to assure the enjoyment of equal opportunity and to prevent further delays by the City." *Id.* The Court held that the

decree's remedies were narrowly tailored to accomplish the purposes of eradicating the past and present effects of the City's discriminatory employment practices. *Id.* at 1309 (Pet.App. p. 73a).

On appeal, the Ninth Circuit performed a two-part review of the District Court's decision. First, the Court of Appeals held that the District Court had not abused its discretion by finding that the consent decree was a fair settlement of a class action pursuant to Rule 23(e). The Court held that the trial court had properly weighed various considerations including the City's risk of being found liable for intentional discrimination. *Davis v. City and County of San Francisco,* 890 F.2d at 1445 (Pet.App. 10a-11a). Second, the Court of Appeals upheld the decree against Local 798's specific challenges under Title VII and equal protection. With respect to these questions, the Court of Appeals applied the same exacting analysis required of any court reviewing race-conscious remedies: Are the provisions strictly tailored to remedy the government employer's past discrimination, the evidence of which must be clearly and specifically set forth. *Id.* at 1445-1446 (Pet.App. p. 12a). On the basis of this standard, the Court of Appeals affirmed the District Court's decision but limited the decree's duration from seven years "to seven years or sooner upon the accomplishment of the objectives or the goals of the consent decree." *Id.* at 1448 (Pet.App. p. 16a).

REASONS FOR DENYING THE WRIT

I

The Ninth Circuit Properly Applied The Standard Of Review For Approval Of Class Action Settlements As Well As The Strict Scrutiny Required By This Court For Affirmative Action Programs.

Petitioner argues that the Ninth Circuit failed to determine whether the consent decree satisfied the constitutional demands of strict scrutiny. Petitioner maintains that the appeals court limited its review to the question of whether the trial court had abused its discretion by approving the decree. Such a relaxed standard, petitioner argues, is contrary to the stringent analyzsis

required by this Court for all forms of racial or gender classifications.

Petitioner's argument rests on a tortured reading of the Ninth Circuit's opinion. The Court of Appeals applied the abuse of discretion standard *only* to the issue of whether the District Court properly approved the settlement of a class action under Rule 23(e) of the Federal Rules of Civil Procedure. Finding no abuse of discretion, the Court then considered the separate issues of whether the decree violated the provisions of Title VII or the guarantee of equal protection. On these questions, the Ninth Circuit made an independent determination of whether the decree's affirmative relief could satisfy the exacting constitutional standards established by this Court.

A. Because The Consent Decree Settled A Class Action, The Ninth Circuit First Reviewed The District Court's Decision For An Abuse Of Discretion.

Rule 23(e) requires trial court approval before settlement of a class action. The Ninth Circuit noted that this requirement is designed "to protect the interests of *class members* who may not have received due consideration by those negotiating the settlement." 890 F.2d at 1444, n.5 (Pet.App. pp. 9a-10a) (emphasis in original). The Court doubted whether Local 798, a union which was not a member of the plaintiff-intervenors' class, had standing to raise a fairness objection in addition to its separate challenges under Title VII and the Constitution. Without deciding this question, however, the Court of Appeals reviewed the union's objections to the decree's fairness as well as its statutory and constitutional claims. *Id.*

Under Rule 23(e), the trial court may approve a settlement that is "fundamentally fair, adequate and reasonable." *Id.* at 1444 (Pet.App. p. 9a). As this Court has held, a trial court's approval of a class action settlement is reviewed on appeal to determine whether the court abused its discretion. In *Evans v. Jeff D.*, 475 U.S. 717 (1986), for example, this Court held that a trial court did not abuse its discretion by approving a consent decree that required a waiver of attorneys' fees by counsel for the plaintiff's class. *See also System Federation No. 91 v. Wright*, 364 U.S. 642

(1961) (trial court abused its discretion by not modifying a consent decree). Therefore, the Court of Appeals properly considered whether the trial court had abused its discretion by approving the decree over general objections to its fairness. Satisfied that no abuse had occurred, the Ninth Circuit then turned to Local 798's specific challenges under Title VII and equal protection.

B. On Appeal, Petitioner Invited The Ninth Circuit To Decide Whether The District Court Abused Its Discretion By Approving The Settlement.

Local 798 urged the Ninth Circuit to review the District Court's approval of the consent decree for an abuse of discretion.

> The District Court's approval of the Consent Decree pursuant to its orders dated 5/25/88 and 6/10/88 shall be reviewed on appeal herein under the "abuse of discretion" standard. *Berkman v. City of New York*, 705 F.2d 584 (2nd Cir. 1983).

Petitioner's Brief on Appeal at 25 (attached hereto as Respondent's Appendix [Resp.App.] p. 27a). Local 798, however, did not limit to Rule 23(e) its argument that the District Court had abused its discretion. Instead, the union argued throughout its brief that the Ninth Circuit should review the trial court's constitutional analysis for an abuse of discretion. Thus, Local 798 urged the appellate court to adopt the standard of review which the union now asserts was error. The Ninth Circuit, however, did not follow this approach. The Court clearly applied two different standards: First, the Court reviewed the trial court's approval of the settlement for an abuse of discretion. Satisfied that the District Court had not abused its discretion in applying the standards of Rule 23(e), the Ninth Circuit then conducted an independent consideration of whether the decree's remedial provisions "comport with the equal protection provisions of the fourteenth amendment and Title VII." 890 F.2d at 1445 (Pet.App. p. 11a).

C. The Ninth Circuit Applied An Exacting Standard Of Review To The Affirmative Action Provisions Of The Decree.

This Court has not specified the precise formulation of the reviewing standard applied to government sponsored plans to eliminate the effects of past discrimination, nor has the Court determined whether the standard varies between court ordered remedies and voluntary plans. *Compare City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 720-721 (1989) (plurality opinion) (strict scrutiny required for voluntary plan) *with United States v. Paradise*, 480 U.S. 149, 166 (1987) (plurality opinion) (race-conscious remedies subjected to some "elevated level of scrutiny"). This Court has consistently held, however, that past discrimination by a government employer justifies the use of race-based remedies. "The Court is in agreement that, whatever the formulation employed, remedying past or present discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring).

This Court's decisions have clearly established the roles for trial and appellate courts considering objections to race-conscious remedies. The trial court must set forth the particular findings of fact that support the remedial actions. Without such findings, "an appellate court reviewing a challenge to remedial action by nonminority employees cannot determine whether the race-based action is justified as a remedy for prior discrimination." *Wygant*, 476 U.S. at 278. If such a factual predicate exists, the reviewing court must determine whether the challenged measure is tailored to remedy the effects of discrimination. Under strict scrutiny, the most stringent formulation of this analysis, "the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Id.* at 280.

This Court has always required an independent examination by an appellate court of the objectives and means of any system of race-based remedies. *See Paradise*, 480 U.S. at 167 (plurality opinion) (Court upholds race-conscious remedies after indepen-

dent review because the relief "survives even strict scrutiny analysis"). This determination presents strictly a legal question.

In the instant case, the Ninth Circuit performed its role in the manner required by this Court's decisions. The Court of Appeals first reviewed the record and found a "strong basis in evidence" sufficient to make out a *prima facie* case of past discrimination and to justify affirmative relief. 890 F.2d at 1446-47 (Pet.App. pp. 14a-15a). The Court then analyzed the decree's specific race-conscious remedial provisions to determine whether they were strictly limited to redress the effects of discrimination by the government employer. Using the factors set forth by this Court in *Paradise,* the Ninth Circuit examined the decree's remedial provisions. The independent nature of this review is demonstrated by the Ninth Circuit's decision to modify the duration of the remedial provisions so that they most closely match the goals of eradicating the clearly established effects of past discrimination. 890 F.2d at 1448 (Pet. App. p. 16a).

In summary, there is no merit to Local 798's first question presented for review. The Ninth Circuit performed an independent review of the decree's race-conscious remedies and applied the most exacting standard imposed by this Court for the approval of affirmative action programs.

II

The District Court Made The Proper Factual Determination Of A *Prima Facie* Case Of Employment Discrimination And Narrowly Tailored The Decree's Hiring Goals To Reflect The Actual Labor Market.

As its second basis for the petition, Local 798 maintains that the Ninth Circuit erroneously found a *prima facie* case of employment discrimination by comparing the Fire Department's work force with the City's labor market. The union contends that the Court should have used the labor market of the larger metropolitan area to determine possible adverse impact.

The District Court's determination that the evidence supported a *prima facie* case of discrimination should not be disturbed.

First, Local 798 never presented to the Ninth Circuit a challenge to the undisputed evidence supporting the *prima facie* case of discrimination in hiring. Second, the union's argument rests on a clearly erroneous assumption. The trial court found a *prima facie* case of discrimination based on the adverse impact of the Department's hiring practices on the actual pool of qualified applicants for hiring or promotion. The Court never made a comparison between the results of the selection procedures and the general labor market to determine whether there was a *prima facie* case of employment discrimination. Third, the decree's hiring goals—not the Court's determination of adverse impact—do reflect the percentage of minorities in the City's population. This choice of the City's labor market is fully justified by evidence of twenty years of actual practice.

A. Petitioner Failed To Raise The Question Of The Relevant Labor Market In Its Appeal To The Ninth Circuit.

In its appeal to the Ninth Circuit, Local 798 never intimated that the District Court had used the wrong labor market in its determination of adverse impact. To the contrary, the union accepted the trial court's findings that the evidence supported a *prima facie* case of employment discrimination. In the 1987 order, the District Court reviewed the undisputed facts that the 1982 hiring procedures had an adverse impact on minority and women applicants. The City could not defend the validity of the examinations. Thus, the District Court held that "these facts clearly establish a *prima facie* violation of the law." 656 F.Supp. at 282 (Pet.App. p. 115a). The union agreed with this analysis on appeal. Local 798 did not dispute that the City's examinations had adverse impact and that the City had failed to validate the tests. Rather, the union argued that this *prima facie* case of employment discrimination had been remedied by the 1987 order and did not require affirmative relief. Petitioner's Brief on Appeal at 27-32 (Resp.App. pp. 28a-34a).

Absent exceptional circumstances, this Court will not consider arguments that were not considered by the Court of Appeals. *Kosak v. United States*, 465 U.S. 848, 850 n. 3 (1984); *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 1662 (1988). This Court

should not grant the petition to review a factual determination which petitioner not only failed to raise but conceded on appeal.

B. The District Court Employed A Precise Test For Adverse Impact By Measuring The Effects Of The Hiring Procedures On The Actual Pool of Qualified Applicants.

This Court has recognized that the adverse impact of entry level hiring procedures may be measured by comparing the racial composition of the employer's work force with the racial composition of a relevant labor market. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 337-339 (1977) ("Gross" disparities between the percentage of Blacks in the general population and the percentage in the work force deemed probative of a pattern and practice of discrimination). However, it is often more precise to compare the composition of the work force with the composition of the qualified applicant pool, a method repeatedly validated by this Court.

In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), this Court confirmed that one could establish a *prima facie* case of discrimination based on a substantial disparity in the selection rates of White and Black applicants. In *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977), this Court held that a *prima facie* case could be supported by comparing the racial composition of the teaching staff and the racial composition of the qualified teacher population in the relevant labor market. The Court explicitly noted that applicant flow data had not been developed below, and the district court was admonished to determine whether such data could be developed on remand. *Id.* at 308, n. 13. Justice White's concurring opinion emphasized the primary significance of comparative statistics based upon the actual applicant pool, as opposed to comparative data based on the general labor market. *Id.* at 347-348. *In New York City Transit Auth. v. Beazer*, 440 U.S. 568, 585 (1979), the Court rejected an analysis based on general population data because it "[told] nothing about the class of otherwise qualified applicants and employees."

Wards Cove Packing Co. v. Atonio, ___ U.S. ___, 109 S.Ct. 2115 (1989), cited by petitioner, does not undermine these principles. In that case, the Court confirmed that the underlying task is to present statistical evidence that is reliably probative of adverse impact; whether such evidence consists of comparative data based on the "pool of *qualified* job applicants" or the "*qualified* population in the labor force" may vary from one case to the next. *Id.* at 2122 (emphasis in original). The Court again confirmed the probative value of comparisons based on the population composition of the qualified applicant pool. *Id.* at 2123.

This Court has also recognized that because the actual value of particular statistics in individual cases is dependent upon a multitude of factors, it is proper to defer to the trial court's determination in this regard. *Hazelwood School Dist.*, 433 U.S. at 312. The Ninth Circuit as well as other courts, however, accord a preferred status to comparative statistics based on the composition of the applicant pool. *See, e.g., Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482 (9th Cir. 1983) ("The best evidence of discriminatory impact is proof that an employment practice selects members of a protected class in a proportion smaller than their percentage in the pool of actual applicants."); *United States v. County of Fairfax*, 629 F.2d 932, 940 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981) (applicant flow data found to be most salient proof of the labor market in disparate treatment case); and *Hester v. Southern Ry.*, 497 F.2d 1374, 1379 (5th Cir. 1974) ("The most direct route to proof of racial discrimination in hiring is proof of disparity between the percentage of Blacks among those applying for a particular position and the percentage of Blacks among those hired for the position.").

The District Court in this case presented in some detail the statistics and other evidence upon which a finding of adverse impact rested. 696 F.Supp. at 1296 (Pet.App. pp. 45a-46a). With respect to the Department's entry-level hiring practices, the Court repeated the stipulated facts concerning comparative pass rates among actual entry-level applicants. The Court noted that summary judgment had been granted earlier on the claim that one portion of the entry-level examination resulted in adverse impact

toward Blacks and another portion resulted in adverse impact toward women. *Id.* The City subsequently declared that it would not defend the validity of the tests. Based on these admissions in conjunction with the findings on summary judgment, the District Court determined that there was a *prima facie* violation of Title VII under a theory of disparate impact. *Id.* at 1297 (Pet. App. p. 47a).

In reviewing the history of the litigation, the Ninth Circuit explicitly referred to the District Court's findings relating to passing rates and adverse impact. 890 F.2d at 1443-44 (Pet.App. pp. 7a-8a). The appeals court held that the District Court properly relied upon relevant statistics to determine whether there was sufficient evidence of discrimination. *Id.* at 1446-47 (Pet. App. pp. 14a-15a).[3] There is no basis in this Court's jurisprudence for reviewing the Ninth Circuit's acceptance of the method of statistical analysis used in this case.

C. The Decree's Hiring Goals Are Narrowly Tailored To Reflect Historical Practices.

In approving the long term hiring goal of forty percent for minorities, the District Court relied on statistics showing the percentage of minorities in the City's population. At the trial level, the union objected to this goal because it did not reflect the relevant work force of the Standard Consolidated Statistical Area ("SCSA"). The trial court dismissed this objection in part because "residence in the City has always been a prerequisite for employment in the [Fire Department]." 696 F.Supp. at 1308 (Pet.App. 71a-72a).

In its appeal to the Ninth Circuit, Local 798 never argued that the decree's forty percent target for minorities should be changed to reflect the percentage of minorities in the SCSA. As discussed

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[3] At one point, the Ninth Circuit inadvertently misstated the statistical basis for the District Court's holding as reflecting a comparison with the general labor pool. 890 F.2d at 1446 (Pet.App. p. 14a). The facts recited by the Ninth Circuit, however, make clear that it understood that the applicant pool formed the actual basis for the statistical comparison relied upon by the District Court.

above, the union's petition confuses two distinct issues, each involving reference to a labor pool: first, a determination of a *prima facie* case based on the actual pool of qualified applicants, and second, the evaluation of a hiring goal based on the general labor market. The union failed to present either issue to the Ninth Circuit. Therefore, this Court should decline to consider the issue of the decree's long term hiring goal for minorities. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Even if the union had properly preserved the issue for this Court's consideration, the District Court's prior determination was consistent with this Court's opinion in *Wards Cove*. Since the WACO litigation in the early seventies, the Department had consistently required proof of residency for employment by the Fire Department. *See WACO v. Alioto*, 330 F.Supp. at 543. The applicant pool that supported the trial court's finding of adverse impact satisfied this requirement. Indeed, it would have been error for the trial court to disregard the actual hiring practices of the employer and redraw the relevant labor force for purposes of determining a target goal. *See Hazelwood School Dist.*, 433 U.S. at 312. Therefore, petitioner's second basis for review is without merit.

III

The Consent Decree Properly Limited Promotions To Persons Of Demonstrated Qualifications.

In its third argument, Local 798 maintains that the decree requires the promotion of persons who have not demonstrated their qualifications based on a competitive examination. The union argues that the decree's failure to require all candidates for promotion to pass a test is a violation of Title VII and equal protection.

The implication of the union's argument is that the City should have postponed all promotions until it had administered an examination to establish the qualifications of all candidates. This Court has recognized that a temporary departure from strict examination requirements may be necessary to avoid perpetuating

the effects of prior discrimination while meeting the demands of continuing operations.

> Finally, a District Court may find it necessary to order interim hiring or promotional goals pending the development of non-discriminatory hiring or promotional procedures. In these cases, the use of numerical goals provides a compromise between two unacceptable alternatives: an outright ban on hiring or promotions or continued use of a discriminatory selection procedure.

Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 450-451 (1986). In the instant case, the cost of an additional delay in promotions was severe. As the District Court recognized, the failure to have permanent supervisors imperiled fire suppression and other activities critical to public safety. 696 F.Supp. at 1309 (Pet.App. p. 73a).

This Court has never imposed a statutory or constitutional requirement that an employer must be satisfied through competitive testing that a person possesses the qualifications for promotion. Instead, this Court has focused on the flexibility of affirmative action requirements to ensure that qualified individuals are hired or promoted. *Paradise*, 480 U.S. at 171. The decree, as modified by the District Court, satisfies this interest. The District Court clarified that the City was under no obligation to promote unqualified individuals. The Court modified the decree to require that each candidate's work history and performance evaluations would be considered in making the promotions. 696 F.Supp. at 1306 (Pet. App. pp. 67a-68a).

The City had twice failed to administer valid examinations for lieutenant promotions. To delay promotions until satisfactory promotional procedures had been established would have exacerbated the past effects of the City's failures and impaired the Department's operations. The decree's requirement that only persons of demonstrated skill and experience receive promotions was an appropriate resolution that satisfied both statutory and constitutional demands.

IV

The Ninth Circuit Properly Approved A Consent Decree Requiring Temporary And Narrowly Defined Remedies To Eradicate The Clearly Established Effects Of Prior Discrimination.

As its final basis for the writ, petitioner asserts that the Ninth Circuit approved a decree designed not to remedy the effects of prior discrimination, but to maintain a racially balanced work force. The union relies heavily on the District Court's 1987 order, in which the Court declared that the evidence before it did not justify the imposition of affirmative relief.

Petitioner's argument mistakenly equates the standards governing court-ordered relief and those governing voluntary affirmative action programs. Even if the evidence before the trial court in February 1987 constituted the entire factual support for the decree, the District Court properly could have approved the decree's affirmative relief provisions. A trial court is not prohibited from approving a consent decree "merely because the decree provides broader relief than the court could have awarded after trial." *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland,* 478 U.S. 501, 525 (1986). The test of such a decree is not what a court could have awarded, but whether the race-conscious remedies are consistent with the requirements of Title VII and the demands of equal protection. *Id.* at 530 (O'Connor, J. concurring).

Although voluntary relief may exceed court-imposed remedies in certain cases, that issue is not raised by the instant case. The Ninth Circuit was not presented with a plan for voluntary affirmative action based solely on facts that would not have supported comparable court-ordered relief. The decree reflects evidence that was not before the trial court in February 1987. The City entered into the decree mindful of the risk that certain facts might be established at trial that would support more drastic remedies than those mandated by the consent decree. The District Court made a careful inquiry into the evidence which had been disclosed before trial when it approved the decree.

This Court has repeatedly affirmed the value of voluntary compliance to carry out the goals of Title VII. *United Steelworkers v. Weber,* 443 U.S. 193, 204 (1979); *Johnson v. Transportation Agency,* 480 U.S. 616, 630 (1987). This goal would be defeated if a municipality were required to admit past intentional discrimination to justify its decision to agree to a voluntary program of affirmative action. *Johnson,* 480 U.S. at 652 (O'Connor, J., concurring). Rather, the public employer must be confronted with a "firm basis" for believing that remedial relief is necesary to correct past or present discrimination. *Wygant,* 476 U.S. at 286. The trial court must inquire into the sufficiency of this evidence and cannot rely merely on the employer's declarations of intent. *Croson,* 109 S.Ct. at 724.

This Court has cautioned against reliance solely on evidence of a statistical imbalance between an employer's work force and the percentage of minorities in the relevant labor market as a basis for concluding that discrimination has occurred. Although in some cases a gross statistical disparity may support a *prima facie* case, *see Hazelwood School Dist.,* 433 U.S. at 307-308, such a comparison may fail to take into account other factors, such as societal discrimination, unrelated to the employer's active or passive participation in discrimination. *Croson,* 109 S.Ct. at 720.

In its assessment of the fairness and legality of the consent decree, the District Court carefully avoided reliance on evidence of discrimination that could not be linked to the Department's employment practices or other operations. As noted above, the *prima facie* case rested on the effects of the Department's hiring and promotional procedures on the actual pool of qualified applicants. As the Court found in its 1987 order, the adverse impact of the recent entry and lieutenant examinations extended the City's long line of failures to remedy discriminatory employment practices.

The California Court of Appeal's decision in the FEHC litigation was important as further evidence of this pattern. In its petition, the union dismisses the value of this finding. The District Court, however, carefully avoided ruling on the plaintiff-intervenors' request for remedial relief until the challenges to the earlier promotional examination were finally resolved. The determination

that the 1978 lieutenant examination violated the standards of Title VII completed a link between the effects of the entry-level practices condemned in the WACO litigation and the first promotional opportunities afforded minority firefighters who had entered the Department. Because the next promotional examination, the 1984 lieutenant examination, also had adverse impact, promotional opportunities for minorities had been largely foreclosed for a decade. This pattern of adverse impact produced by invalid examinations at the entry and first promotional stages would, taken together, justify affirmative relief. *Sheet Metal Workers,* 478 U.S. at 477.

The District Court also found "significant evidence regarding racial harassment" that was added to the record after the issuance of the 1987 order. 696 F.Supp. at 1308 (Pet.App. p. 70a). Prior to the entry of the order approving the consent decree, the Court made specific findings that the Fire Department had failed to carry out its obligations to prohibit racial harassment and that "delays in investigating charges of harassment suggested an atmosphere of toleration for such incidents." *Id.* at 1298 (Pet.App. p. 50a).

The existence of an atmosphere of racial hostility is itself a reason to conclude that more common forms of relief will not be adequate. A hostile work environment discourages qualified minorities from seeking employment and prevents minority employees from obtaining the experience and training necessary for promotional advancement. In such cases, "affirmative race-conscious relief may be the only means available 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.' " *Sheet Metal Workers,* 478 U.S. at 450 (quoting *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 800 (1973)). In the instant case, the plaintiff-intervenors' allegations that the Department had tolerated or encouraged a pervasive atmosphere of racial hostility were never resolved at trial. The District Court's findings, however, clearly formed a strong basis for the City to believe that affirmative steps were necessary to remedy the effects of past discrimination.

The remedial provisions of the consent decree were narrowly tailored to conform to the evidence of past discrimination. The immediate promotions to the rank of lieutenant were designed to overcome those barriers that had blocked the advancement of minorities, a situation unredressed by the WACO litigation. These promotions also broke down the racial stratification between entry-level firefighters and supervisors that likely contributed to the evidence of racial harassment noted by the District Court. These one-time promotional remedies were an essential part of a decree designed "to dismantle prior patterns of employment discrimination and to prevent discrimination in the future." *Sheet Metal Workers,* 478 U.S. at 474 (plurality opinion). The decree ensures a fair possibility for future promotions by requiring a schedule of examinations and providing meaningful opportunities to compete for higher level, supervisory positions. Therefore, both the basis justifying affirmative action and the means to effect this objective meet the most stringent test required by this Court.

CONCLUSION

For the reasons set forth above, the writ of certiorari should be denied.

Respectfully submitted,

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RESPONDENT'S APPENDIX

A. Brief of Appellant, San Francisco Fire Fighters Local 798, *United States, et al., v. The City and County of San Francisco, et al.*, Case Nos. 88-1905, 88-2735, 88-2884, 88-15473, 88-15474, filed with the Ninth Circuit Court of Appeals

APPENDIX A

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff,

FONTAINE DAVIS, et al.,
Plaintiffs in Intervention,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, et al.,
Defendants,

SAN FRANCISCO FIRE FIGHTERS, LOCAL 798,
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
AFL-CIO,
Defendant in Intervention.

FONTAINE DAVIS, et al.,
Plaintiffs,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, et al.,
Defendants.

Nos. 88-2735
88-2884
88-15473
88-15474
(Consolidated)

District Court Nos.
C84-7089 MHP &
C84-1100 MHP

Appeals of Orders of the United States District Court for the Northern District of California

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U.S.A. vs. City and County of San Francisco

Nos. 88-2735
88-2884
88-15473
88-15474

Rule 28-2.1 Certificate

The undersigned, counsel of record for Appellant, certifies that the following have an interest in the outcome of this case: In addition to Appellant Local 798 and all parties to this action, all employees and all potential future employees (i.e. applicants) of the San Francisco Fire Department.

These representations are made to enable judges of the court to evaluate possible recusal.

DUANE W. RENO
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Attorney of Record for Appellant

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Youngblood v. Dalzell (6th Cir. 1986) 804 F.2d 360 .....

Miscellaneous

28 U.S.C.:
§ 1292(a)(1) .....
§ 2106 .....
2 U.S.C. § 2000e *et seq.*, Title VII of The Civil Rights Act of 1964, as amended .....
Federal Rules of Appellate Procedure Rule 4(a)(1) .....
29 C.F.R. § 1607.1 *et seq.*, (Uniform Guidelines On Employee Selection Procedures) .....
Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3523 .....

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff,

FONTAINE DAVIS, et al.,
Plaintiffs in Intervention,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, et al.,
Defendants,

SAN FRANCISCO FIRE FIGHTERS, LOCAL 798,
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
AFL-CIO,
Defendant in Intervention.

FONTAINE DAVIS, et al.,
Plaintiffs,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, et al.,
Defendants.

Nos. 88-2735
88-2884
88-15473
88-15474
(Consolidated)

District Court Nos.
C84-7089 MHP &
C84-1100 MHP

Appeals of Orders of the United States District Court for the Northern District of California

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BRIEF OF APPELLANT

I

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues presented for review in these consolidated appeals are:

(1) Whether the evidence in the record was sufficient under Title VII of the Civil Rights Act of 1964 and the United States Constitution to justify the affirmative, race and sex-conscious relief provided by the consent decree that is the subject of these appeals.

(2) Whether the District Court erred in applying a constitutional equal protection analysis of the consent decree that utilized a standard more lenient than the traditional "strict scrutiny."

(3) Whether the relief granted by the consent decree was sufficiently narrowly tailored to its goals as required under Title VII and the 14th Amendment.

(4) Whether the terms of the consent decree entered into by defendants and plaintiff-intervenors were fundamentally fair, adequate and reasonable.

(5) Whether Defendant-intervenor Local 798 has standing to challenge the race-conscious assignment of seniority to employees who obtained promotions pursuant to the consent decree.

(6) Whether the District Court erred in denying Local 798's request for an injunction restraining Defendant City and County of San Francisco from assigning seniority on the basis of race and/or ethnic origin to employees who obtained promotions pursuant to the consent decree.

II

STATEMENT OF JURISDICTION

The statutory basis of subject matter jurisdiction of the District Court is found at 42 U.S.C. § 2003 *et seq.*, Title VII of the Civil Rights Act of 1964, as amended.

Three of the orders at issue in these consolidated appeals together approve the consent decree, and are orders of the District Court properly reviewed by this Court prusuant to 28 U.S.C. §§ 2106 and 1292(a)(1). The last two orders at issue in these consolidated appeals deny requests for injunctive relief, and are properly reviewed pursuant to 28 U.S.C. § 1292(a)(1).

The first and second orders on appeal herein were each entered by the District Court on 5/25/88. (CR 916 and CR 917) Defendant-in-intervention San Francisco Fire Fighters Local 798, IAFF, AFL-CIO (herein "Appellant" or "Local 798" or "Union") filed its Notice of Appeal of these orders (CR 920) on 5/31/88, within the time permitted by Rule 4(a)(1) of the Federal Rules of Appellate Procedure.

The third order on appeal herein was enterd by the District Court on 6/10/88. (CR 922) The Union filed its Notice of Appeal of this order (CR 927) on 6/15/88, also within the time permitted by F.R.A.P. 4(a)(1).

The fourth order on appeal herein was announced by the District Court on 9/26/88. The Union filed its Notice of Appeal of this order on 10/6/88, within the time permitted by F.R.A.P. 4(a)(1). (CR 1046)

The fifth order on appeal herein was announced by the District Court on 10/17/88. The Union filed its Notice of Appeal of this order on 10/17/88, wihtin the time permitted by F.R.A.P. 4(a)(1). (CR 1053)

III

STATEMENT OF THE CASE

A. Introduction

This is an appeal by Local 798 from the District Court's approval and authorization of a Consent Decree entered into on 11/12/87 by defendants and plaintiff-intervenors in order to "avoid the delay and expense of continued litigation" and to "insure that any disadvantage to minorities and females that may have resulted from past employment practices be remedied so that equal employment opportunity will be provided to all." (CR

695:4) Local 798 also appeals from the denial by the District Court of the Union's request for injunctive relief restraining Defendant City and County of San Francisco from assigning seniority on the basis of race and/or ethnic origin to employees who obtained promotions pursuant to the consent decree.

B. Background Of This Litigation

1. The Challenge Of The Entry-Level Firefighter Exam In "WACO"

In 1970 the N.A.A.C.P. and various other community organizations brought suit against the City and County of San Francisco for employment discrimination in *Western Addition Community Organization [WACO] v. Alioto,* C-70-1335 WTS. At that time, only four out of 1800 uniformed firefighters employed by the San Francisco Fire Department (herein "SFFD") were Black. *See WACO v. Alioto,* 330 F.Supp. 536, 538 (N.D. Cal. 1971) (*"WACO I"*). The *WACO I* plaintiffs challenged the validity of the written component of the 1968 entry-level firefighter test. *WACO I, supra,* at 537, 538. The *WACO I* court found that this test adversely impacted minority applicants and ordered the City to modify it. *WACO I, supra,* at 540.

A modified exam was given later that year, but it was also found to have an adverse impact on minorities. The court enjoined the City from using this exam after the City failed to establish that the modified exam was job-related. *WACO v. Alioto,* 340 F.Supp. 1351, 1356 (N.D.Cal. 1972). (*"WACO II"*).

In 1973 the Court was presented with a new written test, but again the court found that the City could not demonstrate the validity of the test. *See WACO v. Alioto,* 360 F.Supp. 733, 739-741 (N.D. Cal. 1973) (*"WACO III"*). The court ordered the City not to use written portion of the 1973 test for ranking purposes and ordered the Civil Service Commission to empirically validate that part of the test. *WACO III, supra,* at 740.

Later in 1973 the court imposed a 50% cut-off score for that test, at which only 4 persons—3 Blacks and 1 Asian—did not pass. Employment was then offered to persons on the resulting list of eligibles on a 1-minority to 1-non-minority basis, until all

minority applicants had been hired. *WACO v. Alioto,* 369 F.Supp. 77, 80-81 (N.D. Cal. 1973) (*"WACO IV"),* app. dism'd, 514 F.2d 542 (9th Cir. 1975), cert.den. 423 U.S. 1014 (1975).

In 1976 the City presented new entry-level exams, which used the 1973 multiple choice test with a cut-off score of 70% and which constitute 40% of the total score used to determine the rank order of applicants on the list of eligibles. Applicants also had to pass a physical agility test (PAT), which constituted 60% of the total score.

On 5/18/77 the District Court approved a consent decree which terminated the *WACO* litigation. In the decree, the court stated that "plaintiffs have demonstrated a prima facie case of racial and national origin discrimination in defendants' manner of entry-level firefighter selection . . . " (CR 426:6). This decree, which established guidelines for the use of exam components from the new 1976 entry-level exam, and which stated as a "goal" that the eligible list reflects 40% minority representation, expired by its own terms in 1982. (CR 426:6)

As of November 1987, 10 years after the entry of the *WACO* Consent Decree, over 55% of the minority firefighters working in the SFFD had been hired pursuant to the affirmative relief granted in 1973 by *WACO IV, supra.* (CR 694:8)

2. The Challenge Of The 1978 Promotional Lieutenants' Exam

During 1980 the California Department of Fair Employment and Housing (DFEH) received 10 complaints from Black firefighters alleging that an exam given in 1978 for promotion to the rank of lieutenant in the SFFD was discriminatory. This exam consisted solely of a written test of an examinees's knowledge of firefighting strategy and technique, arson detection, equipment maintenance, rescue and emergency medical procedures, and report writing. *See City and County of San Francisco v. FEHC,* 191 Cal.App.3d 976, 980-81 (1987). (CR 922:12) After an administrative hearing, the California Fair Employment and Housing Commission (herein "FEHC") determined that this exam had an adverse impact on Black applicants and that the City had failed to show that the exam was sufficiently job-related

under state law to be deemed valid. *CCSF v. FEHC, supra,* at 982.

A superior court decision vacating the decision of the FEHC was reversed by the California Court of Appeal, which held that the FEHC's findings had been supported by the evidence. *CCSF v. FEHC, supra,* at 982, 990, 994. This Court of Appeal decision has become final and was held by the District Court in its 5/25/88 (ancillary) order to have preclusive effect in this litigation. (CR 916:2)

The California Court of Appeal held that the DFEH had established a prima facie case of discrimination by revealing a significant disparity between the passing rates of white and Black examinees. The Court applied the four-fifths rule of the *Uniform Guidelines On Employee Selection Procedures,* 29 C.F.R. Section 1607.1 *et seq.,* which provides that a selection rate among minority applicants of less than 80% of the rate of the group with the highest selection rate (usually non-minorities) is considered strong evidence of an adverse impact. *Uniform Guidelines, supra,* 29 C.F.R. Section 1607.4(D), as cited in *CCSF v. FEHC, supra,* at 986-987.

Having determined that this test had an adverse impact upon Black applicants, the court concluded that substantial evidence supported the FEHC's findings that the test was unrelated to the job of fire lieutenant, and was thus not validated, for the reason that written tests alone are an inappropriate measure of the supervisory skills required of a fire lieutenant. *CCSF v. FEHC, supra,* at 990.

In order to avoid the possibility of inconsistent relief vis-a-vis the above-mentioned state court action and the current litigation, the Court of Appeal vacated the relief ordered by the FEHC and deferred the granting of relief pending the outcome of this litigation. *CCSF v. FEHC, supra,* at 944. (CR 922:15)

3. Current Litigation Re: Entry-Level and Promotional Exams

Upon the expiration of the *WACO* Consent Decree in 1982, the City administered a new entry-level test in 1982-83, and a new lieutenant's test in 1984. The City also administered a promo-

tional examination for the position of fire inspector in 1984. (CR 426:8; CR 922:16) After the results of the 1982-83 entry-level test were posted, the United States and plaintiff-intervenors Fontaine Davis, et al. brought separate suits in the United States District Court for the Northern District of California over the alleged failure by the City to correct the effects of past discrimination and for its allegedly continued use of invalid hiring procedures that have an adverse impact on women and minorities. The United States sought relief for Black, Asian, and Hispanic applicants. The plaintiff-intervenors sued on behalf of women and Blacks, and added claims for "racial harassment." Asian and Hispanic intervenors subsequently were joined in the action, along with individual claims for relief. (CR 922:16) These actions were assigned to District Judge Marilyn Hall Patel for pre-trial proceedings and for trial.

These cases, consolidated in 1986, focused specifically on the allegedly adverse impact of the 1982-83 entry-level exam, the 1984 lieutenants' exam, and the 1984 fire inspectors's exam. The plaintiff-intervenors also alleged charges of racial harassment.

On 2/12/86 the District Court issued a preliminary injunction against the use by the City of the list of eligibles which resulted from the 1982-83 entry-level exam. (CR 154:15) Of the top scorers on this test who obtained places on the eligibility list, 66% were white, 19% Black, 5% Hispanic, and 8% Asian. None were women. (CR 694:12-13)

On 6/23/86 the District Court granted partial summary judgment that the 1982-83 entry-level written exam adversely impacted Blacks and that the 1982-83 entry-level Physical Agility Test (PAT) adversely impacted women. (CR 289:8-9)

On 10/23/86, vitually on the eve of trial, the City declared that it would not defend the validity of these entry-level and promotional exams. The three tests, along with all resulting eligibility lists, were subsequently cancelled. (CR 379) In response to the City's withdrawal of these tests and defenses of their validity, the United States and plaintiff-intervenors Fontaine Davis, et al. moved for summary judgment. (CR 389; CR 396; CR 408) On 2/26/87 the District Court granted their separate motions and

issued a permanent injunction. *See U.S. v. CCSF*, 656 F.Supp. 276 (N.D. Cal.1987). (CR 426) This 2/26/87 injunction, which was to remain in effect for 5 years, prohibited violations of Title VII by the SFFD or the toleration of such violations by any SFFD employees; required the institution of recruitment and training programs; required new test development according to the *Uniform Guidelines*; set forth a schedule for test development deadlines; and required semiannual progress reports to the court. (CR 426) In addition, this injunctive order provided for provisional interim hiring to avoid a "staffing emergency." (CR 426)

On 2/5/88, in response to allegations by plaintiff-intervenors that defendants were in contempt of this 2/26/87 order, the District Court issued a broad-sweeping injunction binding the SFFD and 61 officers, in their individual capacities, to carry out the terms of this new injunction, under penalty of contempt. (CR 879) This 2/5/88 injunction is the subject of a separate appeal in this Court. (No. 88-1905) (CR 884)

On 11/12/87 Defendant City and plaintiff-intervenors Fontaine Davis, et al. entered into the Consent Decree on appeal herein. (CR 695) A fairness hearing was held on 12/22/87. (CR 840) The United States, Local 798, and numerous individuals filed objections to the decree. (CR 714-737, 739-819, 821-835, 841-846) At a hearing on 5/20/88 Judge Patel announced that she had approved the decree. (CR 912) This approval was finalized in the 5/25/88 and 6/10/88 orders at issue herein. (CR 916; CR 917; CR 922) The United States and Local 798 filed timely notices of appeal of those orders. (CR 920, 927, 970)

In her order of 5/25/88 Judge Patel stated that her delay in approving the decree had resulted from a need to modify and finalize the "findings" in support of it. (CR 912:57)

On 5/25/88 Judge Patel also signed an "Order Granting Partial Summary Judgment" ("ancillary order"), granting the motion of plaintiff-intervenors to hold the 1978 lieutenants' exam invalid, and further ordered that all promotions to captain from the existing captains' eligibility list were to be stayed until Black employees promoted to the rank of lieutenant pursuant to the

decree had conpleted a make-up captains' exam and had their scores integrated into that eligibility list. (CR 916)

On 6/13/88 this Court granted a petition from Local 798 for a temporary stay of the consent decree pending the outcome of this appeal. Upon petition from the City for a dissolution of that stay prior to the start of the 1988-89 fiscal year in order that a number of promotions to lieutenant that were to be made under the decree could be effectuated prior to certain anticipated budget reductions, this Court issued an order on June 30, 1988, dissolving the temporary stay. The City thereupon granted promotions to the rank of lieutenant to 76 of the employees who had taken the 1984 exam for that rank.[1]

The City assigned seniority in the rank of lieutenant to these 76 employees on the basis of their race and/or ethnic origin notwithstanding the absence of any provision in the consent decree for the assignment of those privileges in a race-conscious manner. Upon becoming aware of this fact, Local 798 sought injunctive relief from the District Court against that action. (CR 1024-1027, 1040-1043) After expressing the opinion at a hearing on 9/26/88 that Local 798 had no standing to challenge such action by the City because it was not a party to the consent decree, Judge Patel advised the parties that they need not respond to Local 798's motion. (RT 30) At a subsequent hearing on 10/17/88, Judge Patel stated that she was denying Local 798's motion on the grounds that Local 798 had no standing and also that its motion was of no merit. (RT 8-9).

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[1] Local 798 based its request to this Court for a stay order on the holding in *San Francisco Police Officers Assn. v. City and County of San Francisco*, 842 F.2d 1126 (9th Cir. 1988) (petition pending for rehearing *en banc*), that an appeal in a similar action had become moot upon the promotion of the minority employees who were the beneficiaries of race-conscious actions on the part of the City. The decision of this Court dissolving the temporary stay stated that the Court would issue an opinion explaining that action "in due course." This opinion has yet to be issued. Local 798 assumes that this Court would not have dissolved its temporary stay if the result of that action would be to deprive Local 798 of any remedy by way of its appeal.

On December 2, 1988, the attorneys for plaintiff-intervenors Fontaine Davis, et al. served defendants and defendants-in-intervention with notice of a motion to be heard on April 17, 1988, for an award of attorneys' fees to them in the amount of $3,998,633.22 for their work up to May 20, 1988, which was the date of the last work done by them prior to approval of the consent decree by Judge Patel. (Excerpts of Record, pp. 356-400; see p. 365 for statement of claimed amount) Their memorandum of points and authorities in support of this motion asserts that "The result [of their efforts in this litigation] is *a decree of far greater breadth and scope than almost all other employment discrimination litigation.*" (Excerpts of Record, p. 385, lns. 14-16) (emphasis added)

C. Decision Of The District Court

Judge Patel's decision approving the consent decree stated that she reviewed the terms of the decree "not only for the fairness of its terms, but also to insure its statutory and constitutional validity." (CR 922:28)

1. Fairness Of The Terms Of The Decree

Judge Patel found the terms of the decree "fair, adequate and reasonable" based not only upon the reactions of interested parties as evidenced by the fairness hearing, but also upon additional factors not presented at the hearing, such as "the strength of the plaintiffs' case; the risk, expense, complexity and likely duration of further litigation; and the extent of discovery and state of the proceedings." (CR 922:29, citing factors discussed in *Officers for Justice v. Civil Service Comm'n.*, 688 F.2d 615, 625 (9th Cir. 1982), cert.den., 459 U.S. 1217 (1983); CR 922:54)

After acknowledging that "113 persons took the time and effort to file written objections," the Court categorized these objections and then set forth its findings of fairness with respect to each category. (CR 922:39-44) These specific objections are dealt with in Part V, Section C below.

2. Satisfaction Of The Applicable Legal Standards

The Court further found that the Consent Decree was "narrowly tailored to serve a compelling governmental purpose" (CR 922:54) and as such satisfied the legal standards required by both Title VII and the equal protection clause of the 14th Amendment governing settlements affording race and sex-conscious relief in which a governmental entity is a party. (CR 922:29-37)

The Court analyzed the legality of the decree under a two-pronged test, i.e. (1) whether there was adequate [evidentiary] justification for the use of the affirmative action plan, and (2) if so, then whether the plan was sufficiently narrwly tailored toward achieving the particular relief (i.e., or whether it unnecessarily burdened the rights of non-minority employees). (CR 922:29-30)

Applying the first prong of the analysis, the Court found that the decree was adequately justified by evidence of: (1) "the City's pattern and practice of discrimination in hiring and promotion on the basis of race and sex" (CR 922:44); (2) "statistical disparities" shown by plaintiff-intervenors; and (3) the concession by the City that the challenged tests were not "demonstrably job-related" and its failure to produce "valid employee selection procedures." (CR 922:44-45)

In evaluating whether the "justifiable" affirmative action plan in the decree was sufficiently narrowly tailored to satisfy the second prong of the analysis, the Court found that affirmative race- conscious relief was "the *only* effective means to assure the enjoyment of equal employment opportunity and to prevent further delays by the City." (CR 922:45) (Emphasis added) The court considered several factors in making this analysis, and found: (1) that the affirmative relief did not "unnecessarily trammel the rights of or uproot the legitimate expectations of non-minority or male employees and therefore [did] not impose an unacceptable burden" (CR 922:51-52); (2) did not require "rigid quotas," but rather was "highly flexible" with respect to hiring goals and specific minority hiring requirements" (CR 922:49); (3) was reasonable with respect to the "temporary duration of the affirmative action plan" (e.g. 7 yrs) (CR 922:50);

(4) was reasonable in that the numerical relief afforded was "closely related to the relevant labor force" (CR 922:50); (5) did not impose an "absolute bar to the advancement of white males" (CR 922:52); and (6) did not mandate, or even permit, "blind hiring." (CR 922:53, applying factors outlined in *Johnson v. Transportation Agency,* ____ U.S. ____, 107 S.Ct. 1442, 1454-56 (1987); *United States v. Paradise,* ____ U.S. ____, 107 S.Ct. 1053, 1067 (1987); and *Higgins v. City of Vallejo,* 823 F.2d 351, 3357 (9th Cir. 1987)).

Unlike the "fairness" objections which were filed primarily by individual firefighters and members of the public (CR 922:39-44), the objections which related to the application of the legal standards set forth above were filed primarily by the Union. (CR 922:45-55) These objections and the Court's findings with respect to them are dealt with in Part V, Sections A and B below.

D. Provisions Of The Consent Decree

The effect of the Consent Decree was to settle all of the remaining existing disputes between the private plaintiffs (plaintiff-intervenors) and defendents as to "appropriate and valid procedures for the hiring and promotion of firefighters" for the SFFD. The decree also resolved all claims of the private plaintiffs set forth in their complaints and previous orders of the District Court concerning discrimination on the basis of race, ethnic background, national origin, or sex. Futhermore, the decree set forth specific guidelines to be followed by defendants in achieving certain goals for employment of women and minorities in the SFFD. (CR 695:5)

The broad provisions of the decree are outlined below:

1. General Provisions

The decree incorporated relevant portions of the permanent injunctive relief set forth in th Court's 2/26/87 order. (CR 695:6) and Ex. A)

The decree provided that the City shall continue to require that all applicants for the position of H-2 entry-level firefighter be *bona fide* residents of San Francisco at the time of, and for a period of 4 months prior to the time of, their application, and

through the date of their appointment. The "City and County of San Francisco" was specified as the relevant geographic labor market. (CR 695:6)

The decree established a test development committee to develop and administer all entrance and promotional exams required by the decree. (CR 695:7-8)

The decree stated that each hiring and promotional "goal" (discussed below) constituted a target figure to be reached within a specified time period. Any failure to meet a goal must be justified to the Court. (CR 695:9-10) The decree further stated that goals shall not be interpreted to require the hiring or promotion of unqualified persons. (CR 695:7-8)

2. Hiring Goals

The decree established long term hiring goals of 40% minority and 10% female representation in the SFFD. These goals were made subject to the availability of qualified persons. (CR 695:8) The failure to meet these goals by reason of an exam or selection procedure was not to be justified unless that procedure was proven valid under the *Uniform Guidelines, supra.* (CR 695:8)

The provisional firefighters hired pursuant to the Court's 2/26/87 permanent injunction were to be given a special test by 10/1/88, and those who passed were to receive permanent appointments retroactive to their hiring date. (CR 695:9)

The decree provided that at least 500 entry-level firefighters must be hired during the life of the 7-year decree. Of the 10% goal for women in entry-level hiring, at least 50% were to be minority women, and a higher goal was permitted if there were enough qualified candidates. The decree imposed a 55% goal for minorities in entry-level hiring. The minimum goal for each minority group protected by the decree was to be the percentage reflected in the 1980 and 1990 census. As of the date of the decree these percentages were 19% Asian, 10% Black and 11% Hispanic. (CR 695:10-11)

If the City decided to test less than those who apply, the decree required that the testing pool reflect the applicant pool, and be selected at random. (CR 695:11)

3. Promotions

The decree required the promotion of six named Black employees to the rank of lieutenant, retroactive to 3/9/77, with back pay. (CR 695:11) In addition, the decree required that a special "make-up" exam for promotion to the rank of captain be given to these six men by 4/1/88. (CR 695:11-12) The results of this "make-up" exam were to be integrated into the existing list for promotion to fire captain. At that time, the "freeze" on promotions from that pre-existing list (effectuated by the Court's 5/25/88 ancillary order—CR 916) was to be lifted, and those Black lieutenants whose scores on the make-up exam placed them within the range of those already chosen for promotion to captain were to be immediately promoted. The other Black lieutenants who passed the make-up captains' exam were to remain on the eligibility list until they were promoted or the list expired. (CR 695:12)

The decree established that the "goal" for the promotion of minorities and women for each exam given during the life of the decree was that such promotions reflect minority representation in the applicant pool. This applicant pool was defined as those who both are eligible and apply. (CR 695:12)

The decree also set forth a lengthy schedule for the accelerated administration of promotional tests, which was designed to "maximize the opportunity for advancement and promotion of all members" of the SFFD, particularly "minorities and women." The first promotional exam was to be held no later than 12/31/88 and the last to be held no later than 12/31/94. (CR 695:13-15) All eligibility lists provided for in the decree were to expire after 2 years, unless extended by the Court. (CR 695:15) The decree also replaced all applicable provisions of the San Francisco City Charter with its own provisions for an expedited resolution of disputes concerning exams given pursuant to the decree. (CR 695:15-16)

Finallly, the promotional provisions of the decree provided that within 60 days of execution of the decree, the SFFD was to promote (in addition to the six Black employees earlier named) 11 Black, 8 Hispanic, and 8 Asian or Filipino firefighters, selected

from the highest scores on the 1984 lieutenant exam. The SFFD was also permitted to promote an additional 48 lieutenants using the results of the 1984 lieutenant exam in rank order. (CR 695:16-17) Of those promoted, 25% were to be minorities, with each minority group receiving its pro-rata share of appointments. If the SFFD promoted all 48 allowed, 5 were to be Black, 5 Hispanic, and 2 Asian or Filipino. The decree prohibited the promotion to lieutenant of any person found by the Court to have violated federal civil rights laws. (CR 695:16-17)

E. Evidence Presented To The District Court

1. Undisputed Facts

Although the Court stated that it relied both on a "Stipulation of Undisputed Facts" filed 8/15/86 (CR 334) and on the "Statement of Undisputed Facts" filed with the Consent Decree on 11/12/87 (CR 922:3), the most recent statement contained the same basic facts as the earlier one, and the Court made only one reference to the earlier version (CR 922:9), which was duplicated in the recent version. (CR 694:para. 5) That version provides:

Paragraphs 1-4. No women were permitted to apply for the position of entry-level firefighter in the SFFD until 1976, when 313 women applied. None passed the physical agility test ("PAT") that year. The same PAT was used in 1983. The first women were hired in August 1987.

Paragraphs 5-6. In 1970, 4 out of 1,800 uniformed fire personnel were Black. The fifth Black was hired in 1971. Out of 1,380 uniformed personnel in 1985, 5.7% were Black, 6.38% were Hispanic and 2.5% were Asian.

Paragraphs 7-9. As of November 1987 there were 210 permanent lieutenant positions, 80 permanent captain positions, and 62 chief officer positions in the SFFD. These positions included 3 Black and 12 Hispanic lieutenants, 1 Black and 3 Hispanic captains, 1 Black and 1 Hispanic chiefs, and no Asians.

Paragraphs 10-14. These paragraphs attested to the invalidity of the 1968 and 1971 entry-level exams at issue in the *WACO* litigation. (*See* Part III, Section B)

Paragraphs 15-16. The 48th through 61st Fire College classes, beginning in 1974, were appointed from the "E-25" entry-level eligibility list. Beginning with this 48th class, the SFFD revised the procedures for evaluating persons in the Fire College to include weekly equipment manipulation testing and termination procedures for those who failed. Of 426 persons appointed to these classes, 14 were terminated. Of those terminated were 6 Blacks, 2 Hispanics, and 6 whites. Two of the terminated Blacks and 1 of the whites were rehired under the provisions of the *WACO V* Consent Decree, and eventually completed Fire College.

Paragraph 17. The 62nd through 72nd Fire College classes were appointed from an "E-26" eligibility list. Of the 293 persons appointed, 4 were terminated: 2 Blacks, 1 Hispanic, and 1 white.

Paragraphs 18-21. From 1972 through November, 1987, firefighters were appointed from 3 eligibility lists: "P-1," "E-25," and "E-26." Of the 21 persons appointed from the P-1 list were 15 blacks, 1 White, 2 Asians, 1 Hispanic and 2 "other non-whites." Of the 425 persons appointed to H-2 firefighter from the E-25 list were 45 Blacks, 37 Hispanics, 13 Asians and 1 "other non-white." Of the 293 persons appointed H-2 firefighter from the E-26 list were 28 Blacks, 24 Hispanics, 15 Asians and 2 "other non-whites."

Paragraphs 22-24. These paragraphs also attested to the invalidity of the 1971 (modified) entry-level exam, which was enjoined in *WACO II, supra.* (*See* Part III, Section B)

Paragraphs 25-28. These paragraphs attested to the City's inabililty to validate a revised entry-level test given in 1973. (*See WACO III*, Part III, Section B).

Paragraph 29. The *WACO* action (see above in Part III, Section B) was never certified as a class action.

Paragraphs 30-32. These paragraphs set forth the terms of the 1976 entry-level exam and the subsequent consent decree approved in *WACO V, supra,* (*See* Part III, Section B)

Paragraphs 33-38. These paragraphs attested to the challenges made to the 1978 lieutenants' promotional exam and the

court's finding that the exam was invalid. (*See* Part III, Section B above)

Paragraphs 40-42. (The statement included no Paragraph # 39) On 6/16/87 the Court of Appeal for the First Appellate District rendered an opinion, *CCSF v. FEHC, supra,* which had a collateral estoppel effect in this action. (*See* CR 916)

Paragraphs 43-49. These paragraphs related the facts concerning the City's administration of a new entry-level exam in 1982-83 and the statistics relating to the adverse impact this test apparently had upon minorities and women. (*See* Part III, Section B above).

Paragraphs 50-52. These paragraphs attested to the District Court's findings that the 1982-83 written exam adversely impacted Blacks and the 1982-83 PAT adversely impacted women. (*See* Part III, Section B above).

Paragraphs 52-53. These paragraphs set forth the weights of the components of the 1984 lieutenant exam, to wit: (1) written multiple choice job knowledge test, 37.2%; (2) written communications skills test, 7.1%; (3) leaderless group discussion test, 7.7%; and (4) structured oral interview, 33.0%. No passing or cut-off scores were established for any of the components. The City eventually declined to defend the validity of this exam. (*See* Part III, Section B, above)

Paragraph 54. The SFFD's procedure for handling complaints of racial harassment and/or unequal treatment is different from its procedure for handling violations of other SFFD rules and regulations.

Paragrapah 55. Prior to October, 1986, 2 white firefighters had been suspended as a result of investigations by SFFD for complaints of racial harassment and/or unequal treatment which were filed by Black firefighters.

2. Hearing Testimony

Following is a summary of the testimony presented at the "fairness hearing" held on 12/22/87 regarding the consent decree:

Dan Siegel, Deputy City Attorney, explained the City's motives for entering the decree (to avoid litigation), and addressed the issue of the evidentiary justification for the relief granted. (RT 23-24; CR 847:23-24) He stated that an analysis should not be made regarding evidentiary support of each provision, but rather the decree should be viewed as "a whole." (RT 24: CR 847:24) Thus what might be considered as "insufficient promotions" from the 1978 H-20 list would be balanced by possibly "too many" promotions from the 1984 list. (RT 25; CR 847:25)

Siegel then moved to an analysis of whether the relief was narrowly tailored as required by Title VII. (RT; 26 CR 847:26) He pointed to: (1) the pattern of underrepresentation of women and minorities in the SFFD; (2) the percent of whites who will incidentally benefit from the decree; (3) the fact that quotas were not rigidly set; and (4) the temporary nature of the decree, to conclude that the decree was sufficiently narrowly tailored in its provisions for affirmative relief. (RT 26-30; CR 847:26-30) Siegel next defended the use of the invalid 1984 H-20 lieutenants' exam for making 75 immediate promotions, stating that the City will make an "independent assessment of each of the persons who are promoted pursuant to the decree and will promote only those persons who are found to be qualified based upon an assessment of their work histories . . . their performance evaluations and so on." (RT 32; CR 847:32)

Finally, Siegel conceded that the immediate promotion of six Black firefighters to lieutenant from the invalid 1978 lieutenant exam could adversely impact Black Lieutenants Bryant and Armstrong by pushing their seniority for captains' positions down "a notch or two," but claimed this was a "minimal" impact. (RT 34, 36: CR 847:34-36)

Eva Paterson, attorney for plaintiff-intervenors, called two SFFD employees to testify that the decree was fair. Lt. Armstrong, who had filed an objection concerning the unfair effect the decree would have on his prospects for promotion to Captain, testified that he believed the decree was otherwise fair. (RT 52-56) Lt. Armstrong based his approval of the decree primarily on the "fact that the City or Civil Service hasn't been able to come

up with an examination that [would be] fair," both to himself and to whites. (RT 56; CR 847:56)

Lt. Lee also testified that the decree was fair. He believed certain white people had been given information in advance of the 1984 lieutenant exam so that they scored higher, and that Blacks, who "studied and studied," were not given this inside information. (RT 57-58; CR 847:57-58)

Firefighter Christopher Stevenson and Lt. Robert Demmons also spoke in favor of the decree. (RT 65-71; CR 847:65-71) Mr. Stevenson particularly liked the accelerated exam schedule, even though he stated that "the consent decree doesn't really totally satisfy any of the parties." (RT 66; CR 847:66) Lt. Demmons favored the decree because the unemployment rate for Blacks in San Francisco was "a lot higher than 4%" (RT 60; CR 847:69), and because of the "limitations that the law has on people gaining basic human and civil rights." (RT 71; CR 847:71)

Attorney McNeill then addressed the court with assurances that no unqualified persons would be promoted by the decree because "everyone in the fire department is probably qualified to be a lieutenant." (RT 79; CR 847:79)

Attorney Reno, representing Local 798, called SFFD employees to testify as to the unfairness of the decree. (RT 88-118; CR 84788-118) Chief John Flaherty, Lt. Leon Martinez, Chief's operator Brendan O'Leary, and Firefighter John O'Shea, who together had 84 years' experience with the SFFD, all agreed that experience alone does not qualify someone to be a lieutenant, and that an accurate exam is required. (RT 91-95, 101, 107, 116; CR 847:91-95, 101, 107, 116) Mr. Reno concluded that the evidence before the Court did not justify the broad affirmative relief granted by the decree in light of the City's good faith compliance with the *WACO V* hiring order, minority recruitment efforts, attempts to construct valid tests, and the criteria set forth in *United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 20 F.E.P. 1 (1979). (RT 8, 10, 11, 13-15, 26-30, 111-115; CR 847:8, 10, 11, 13-15, 26-30, 111-115) Specific objections brought up at the hearing are addressed below in Part V.

IV

SCOPE OF APPELLATE REVIEW

The District Court's approval of the Consent Decree pursuant to its orders dated 5/25/88 and 6/10/88 shall be reviewed on appeal herein under the "abuse of discretion" standard. *Berkman v. City of New York*, 705 F.2d 584 (2nd Cir. 1983) The District Court's denial of Local 798's motion for injunctive relief prohibiting the assignment of seniority on the basis of race and/or ethnic origin to employees promoted to the rank of lieutenant under the consent decree is reviewed *de novo* for an application of erroneous legal principles. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (*en banc*), *cert. den.* 469 U.S. 824 (1984); *SEC v. Goldfield Deep Mines Co. of Nevada*, 758 F.2d 459, 465 (9th Cir. 1985).

V

ARGUMENT

The approval by the District Court of a consent decree resolving an employment discrimination action against a public agency constitutes an abuse of discretion if the decree contains provisions that are unreasonable, unlawful, or against public policy. *Berkman, supra,* at 587. *See also EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884 (7th Cir. 1985) and *William v. New Orleans*, 729 F.2d 1554 (8th Cir. 1984).

In *Berkman, supra*, the United States Court of Appeals for the Second Circuit affirmed a District Court order approving the parties' interim hiring agreement affecting women employees in the New York City Fire Department in a Title VII action. The court found no provisions in the parties' hiring agreement that were unreasonable, unlawful, or against public policy. *Berkman, supra*, at 597.

Unlike the *Berkman* agreement, the Consent Decree on appeal herein contains provisions that are unreasonable, unfair, in violation of both Title VII and the equal protection clause of the 14th Amendment, and against public policy, and as such, the District Court's approval of the decree was an abuse of discretion.

A. The District Court Abused Its Discretion By Finding That The Evidence Justified Approval Of The Consent Decree's Affirmative Race and Sex Conscious Relief

An employer's voluntary affirmation action plan is valid under Title VII and the equal protection clause if the evidence of discrimination is sufficient to justify the use of such relief (subject to the further analysis of whether the relief has been properly tailored to the achievement of the employer's goals—*See* below in Part B). *Johnson v. Transportation, supra*, 107 S.Ct. at 1446, 1452; *Wygant v. Jackson Board of Education*, ____ U.S. ____, 106 S.Ct. 1842 (1986).

The evidence in the record of this action does not adequately support the Consent Decree's affirmative relief. The District Court's approval of such relief was therefore an abuse of discretion.

1. The Affirmative Relief Provisions In The Decree Were Not Justified By The Evidence Required By A Title VII Analysis.

In a Title VII suit, once a plaintiff establishes a *prima facie* case that race or sex has been taken into account in an employment decision, the burden then shifts to the employer to articulate a nondiscriminatory rationale for its decision. Such a valid rationale would be either the existence of an affirmative action plan, or the implication of the extremely narrow "*bona fide* occupational qualification" exception to Title VII (42 U.S.C. Section 2000e-2(e)). The burden then shifts to the plaintiff to prove that the justification is "pretextual" and the plan invalid. *Johnson, supra*, at 1449, citing *McDonald Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973).

The Supreme Court has applied various factors in determining whether such a plan is factually justified, and has concluded that a plan adopted by an agency "to address a conspicuous imbalance in [that] agency's work force" or a "manifest . . . imbalance" in a traditionally segregated job category is initially justified (subject to being sufficiently narrowly tailored). *Johnson, supra*, at 1449, 1460; *See also Steelworkers v. Weber, supra*, 443 U.S. at 197.

There was no such factual justification underlying the broad affirmative relief provided for the Consent Decree.

In a case involving a Title VII consent decree, the court is required to become more involved than in an ordinary case. Even when all the parties agree to the settlement the court should:

> examine it carefully to ascertain not only that it is a fair settlement but also that it does not put the *court's sanction on and power behind* a decree that violation constitution, statute or jurisprudence. This requires a determination that the proposal represents a *reasonable factual* and legal determination based on the *facts of the record,* whether established by evidence, affidavit or stipulation." *U.S. v. City of Miami,* 614 F.2d 1322, 22 FEP 846, aff'd in part and in part vacated and remanded on other grounds, 664 F.2d 435, at 441; 27 FEP 713 (5th Cir. 1981) (en banc) (Emphasis added)

The decree's affirmative relief consisted of hiring goals (500 entry-level firefighters over 7-10 years, 40% to be minorities and 10% to be women, 50% of women to be minorities) and promotional goals (specified numbers of minority employees promoted from 1984 lieutenant exam, 6 Blacks promoted from 1978 lieutenant exam, make-up captain exam to benefit specific Black employees, and schedule for accelerated promotional tests). (*See* Part III, Section D above) These far-reaching race-based and gender-based provisions were not justified by the evidence.

The 11/12/87 Statement of Undisputed Facts (CR 694) and the prior 8/15/86 Stipulation of Undisputed Facts (CR 334) demonstrate only that the San Francisco Civil Service Commission, the entity responsible for the administration of examinations for entrance into the Fire Department, has failed to administer entry-level or promotional examinations since 1968 which exhibited no adverse impact upon women or minority applicants.

However, the District Court had remedied these adverse effects prior to its approval of the 11/12/87 Consent Decree.

Remedies for the challenged 1971 and 1973 examinations were provided as part of the settlement of the *WACO* litigation in the

form of injunctions prohibiting hiring, setting lower cut-off scores and ordering one-for-one quota hiring of minorities. (*See* Part III, Sections B and E above) The 1977 *WACO* consent decree also mandated the manner in which the 1976 and 1982 entry-level exams were to be administered and used (CR 694, 11) It necessarily follows that the adverse effect of those examinations upon minority applicants cannot be deemed to have resulted from unlawful discrimination. The decree on appeal herein is intended to remedy a "pattern and practice of unlawful discrimination within the San Francisco Fire Department" for which there was no record as of 11/12/87 and for which there is no record now.

The Court had also already awarded permanent injunctive relief in response to a motion for partial summary judgment over claims arising from the administration of the 1982 entry level examination and the 1984 fire inspector and lieutenant promotional examinations.

That relief, ordered by the court on 2/26/87, provided, *inter alia*, for the development of new selection procedures to be valid under the requirements of the *Uniform Guidelines* and Title VII for the ranks of firefighter, inspector, and lieutenant, and prohibited the use of invalid selection procedures in other ranks. The order further provided that examinations for the above-identified ranks were to be administered by 3/31/88. The order required the defendants to undertake an aggressive recruitment program and imposed certain monitoring and record-keeping obligations to ensure compliance with the order. Finally, the order allowed defendants to hire a specified number of candidates from the 1982 entry-level list for firefighter on a provisional basis and in accordance with race and gender-conscious quotas to alleviate a critical shortage of firefighting personnel in the San Francisco Fire Department.

The Court specifically stated in its order of 2/26/87 that the evidentiary record before it at that time was insufficient to justify any relief beyond the injunctive relief and the provision for interim hiring referred to above:

> On a record limited only to the *bare fact* that the City administered and then cancelled, prior to hiring, certain

> invalid examinations, the court *as a matter of law cannot* find a discriminatory denial of individual employment opportunities violative of Title VII. *Memorandum Decision and Order Granting Plaintiffs' Motion For Partial Summary Judgment.* (CR 426:18-19) (Emphasis added)

The court also stated, in the same order, that it was:

> hesitant on the rather barren record of undisputed facts to attempt to identify the effects of past discrimination which possibly have lingered within the SFFD beyond the expiration of the *WACO* consent decree. (CR 426, *supra*)

The Statement of Undisputed Facts presented in support of the consent decree added no substantive facts to the record that was already before the court on 2/26/87, and which the Court, as indicated above, deemed to be too barren to warrant any relief other than the narrow injunctive relief granted at that time.

In its 6/10/88 Memorandum approving the Consent Decree, the Court pointed to only three pieces of "evidence" beyond that relied upon to support the prior 2/26/87 injunction: (1) the parties' stipulation that the SFFD's procedure for handling charges of racial harassment was "different from" that used for other violations (CR 922:20, citing CR 694:13); (2) the parties' stipulation that prior to October 1986 "only 2" white firefighters had been suspended as a result of complaints of racial harassment (CR 922:21, citing 694:14); and (3) the "sworn testimony" of SFFD Chief Phipps at the 1/14/88 contempt hearing concerning an incident in which a swastika plaque was allegedly placed in an office used by minority inspectors. (CR 922:21-23, citing CR 861 —hearing testimony)

The District Court found that these three additional pieces of evidence, combined with the admittedly "bare" record that existed on 2/26/87, constituted a pattern and practice of racial and sexual discrimination in the hiring and promotional practices of the SFFD justifying the broad affirmative relief contained in the decree. However, these three pieces of "evidence" had nothing to do with hiring or promotions. The "swastika incident" upon which the Court most heavily relied is still unresolved. The fact that "different" procedures are used in investigating racial harassment

claims than other violations may be evidence of the SFFD's attempt to deal *more* effectively with these claims. Finally, these three additional "facts" dealt with alleged racial discrimination only, and thus offered no support for the gender-based affirmative provisions in the decree.

If the record on 2/26/87 was an insufficient basis for relief beyond the injunction granted then, the record on 6/10/88 offered no greater support for the Court's approval of the decree.

2. The Affirmative Relief Provisions In the Decree Were Not Justified By The Evidence Required By An Equal Protection Analysis.

As discussed above, while an employer's affirmative action plan might withstand a Title VII attack by a showing of a "conspicuous imbalance" in its work force or by a "manifest imbalance" in the particular job category, a plan entered into by a municipality such as the City and County of San Francisco consititutes "state action" and therefore also invokes the greater scrutiny of the equal protection clause of the 14th Amendment. *Johnson v. Transportation, supra,* 107 S.Ct. at 1446, n.2; *Wygant, supra; Local Number 93 Int'l Ass'n of Firefighters v. City of Cleveland,* ___ U.S. ___, 106 S.Ct. 3063, 3077-3088 (1986).

The Supreme Court warned in *Local 93, supra, at 3077-3088*:

> the fact that the parties have consented to the relief contained in the decree does not render their action immune from attack on the ground that it violates Sec. 703 of Title VII or the Fourteenth Amendment.

Although it has been well established that government bodies "may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination" (*U.S. States v. Paradise, supra*, at 1064; *Local 28 of the Sheet Metal Workers' Int.'l Ass'n v. EEOC*, 478 U.S. 421, 106 S.CT. 3019 (1986); *Wygant, supra*, at 1853) the Supreme Court has consistently held under a constitutional analysis that an elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes. This traditional "strict scrutiny" test is generally satisfied by a showing that the relief is

"narrowly tailored" to serve a "compelling governmental purpose," evidenced by a showing of discrimination that is "egregious," i.e. pervasive, systematic, and obstinate. *U.S. v. Paradise, supra*, at 1064-1065, citing *Wygant, supra*, at 1846 and *NAACP v. Allen*, 340 F.Supp. 703, 705 (N.D. Ala. 1972).

Although on occasion the Supreme Court has articulated this test with different language (i.e. as requiring relief to be "substantially related to the achievement of important governmental objectives") (*See Univ. of California Regents v. Bakke*, 438 U.S. 265, 359, 98 S.Ct. 2733, 2783 (1978), as quoted by the dissent in *Wygant, supra*, at 1861), overall the court has recognized that "any racial classification is subject to misuse" and that even the seemingly lesser standard set forth above is "genuinely a 'strict and searching' judicial inquiry." *Wygant, supra*, at 1861, citing *Regents, supra*, at 362.

This District Court interpreted *Wygant* to stand for the proposition that a public employer's *"voluntary* adopted affirmative action plan" required evidence less than that generally required under an equal protection analysis. (CR 922:32) (Emphasis added) The Court relied on Justice O'Connor's "strong basis in evidence" standard (*Wygant, supra*, at 286) (O'Connor, J., concurring in plurality) to hold that "statistical evidence of disparity sufficient to support a prima facie case under Title VII would *justify voluntary* affirmative action consistent with the Constitution." (CR 922:33, citing *Wygant*, at 292) (Emphasis added)

This is inconsistent with the test under Title VII, set forth above, which provides that a prima facie case of statistical discrimination is rebutted by an affirmative action plan which *in turn* is rebutted by evidentiary justification.

There is no logic in interpreting equal protection requirements to be *more* lenient than those of Title VII, especially when it is generally accepted that the opposite holds true. (*See Johnson, supra*, at 1446; *Wygant, supra;* and *Local 93, supra*) In addition, to interpret constitutional requirements to be the same as those of Title VII is unsupported. The District Court's reasoning that this interpretation is selectively warranted for *voluntary* plans (but not

for court-ordered plans) is a misreading of *Wygant*. In *Wygant*, a public school board's voluntary plan extending preferential protection against layoffs to minority employees was found to have *violated* the 14th Amendment because no showing was made of prior racial discrimination by the board. (*Wygant, supra,* at 1847. *Wygant's* "strong basis in evidence" was held to be more than societal discrimination, and required a showing that there was prior discrimination by that governmental entity. The *Wygant* Court did not attempt to analyze this further, since it then found that the layoff provision at issue "was not a legally appropriate means of achieving . . . a *compelling* purpose." (*Wygant, supra,* at 1849, referring to the traditional strict scrutiny test) (Emphasis added)

It has been shown above that the evidence of discrimination was not sufficient to support the decree under Title VII. As such, it was certainly insufficient under the equal protection clause, even if, as attempted by the District Court, the constitutional standard is "lowered" to that of Title VII.

B. The District Court Abused Its Discretion By Approving A Consent Decree Containing Provisions Inadequately Tailored to Achieving Its Goals.

Even if a public employer's affirmative action plan is found "justified" by the evidence required under a Title VII and/or equal protection clause attack, it is still subject to attack on the grounds that the plan's provisions were not sufficiently "narrowly tailored" to the implementation of the government's goals (e.g. preventing employment discrimination). *Johnson, supra,* at 1452; *Wygant, supra,* at 274; *Sheet Metal Workers', supra,* at 3050 (1986); *Weber, supra,* at 208; *U.S. v. Paradise, supra,* 107 S.Ct. at 1067; *Higgins, supra,* 823 F.2d at 356-358.

Under either a Title VII or equal protection attack, this "tailoring" analysis (also articulated as whether an otherwise justifiable remedy is nonetheless too burdensome to innocent non-minorities) involves application of the same factors: (1) whether the plan requires "blind hiring" of minority applicants without regard to qualifications; (2) whether the plan requires rigid quotas or flexible goals; (3) whether the plan is temporary or designed to

maintain a permanently balanced work force; (4) the relationship between the numerical relief and the percentage of minorities in the relevant work force, (5) whether the plan unnecessarily trammels the rights of non-minorities or acts as an absolute bar to their advancement; and (6) whether the plan uproots the legitimate expectations of non-minorities. *See, e.g., Johnson, supra*, at 1454-56; *U.S. v. Paradise, supra*, at 1067; and *Higgins, supra*, at 357.

Applying these factors, the Court concluded that the decree's "[a]ffirmative race-conscious relief is the *only* effective means to assure the enjoyment of equal employment opportunity and to prevent further delays by the City." (CR 299:45) (Emphasis added)

This conclusion was wrong. As shown below, the decree's remedies were *not* sufficiently narrowly tailored to the eradication of emplyment discrimination in the SFFD.

1. Blind Hiring The District Court found that "promotions will not be blind. Race will be only one consideration among others, including each candidate's work history and performance evaluation." (CR 922:42) The Court also pointed to the provision in the decree stating that the decree did not require the promotion of "unqualified candidates" to show that hiring would not be blind. (CR 922:49)

The mandate of the decree for the appointment of 27 minorities to the position of fire lieutenant has no provision, however, by which that mandate can be suspended if there is an insufficient number of qualified minority applicants. (CR 695:16-17) In *U.S. v. Paradise, supra*, at 1070, the court found a one-for-one hiring requirement to be "flexible" in application because that requirement could be waived if no qualified black candidates were available. Further, that provision applied only when the department needed to make promotions and lasted only until the department came up with a procedure that did not have a discriminatory impact on Blacks.

Here, on the other hand, the decree required 27 positions in the rank of lieutenant to be filled from a list generated from the concededly invalid 1984 test. (CR 695:17) No minimum qualify-

ing score was ever established for any of the components of this test. Every person who "completed" the test was put onto the list. Some of the applicants who were to receive appointments were not even ranked in the top half of the 415 persons tested. This is clearly impermissible "blind hiring." *See Hammon v. Barry*, 826 F.2d 73 (D.C. Cir. 1987), where a hiring goal was held unlawful because appointments were made on the basis of an invalid exam in the absence of nearly any other screening criteria such that the hiring decision was based almost entirely on a number.

It is well established that where an applicant has not been shown to be qualified for a position, affirmative action considera-tioins do not properly come into play. *Bratton v. City of Detroit*, 704 F.2d 978, 892 (6th Cir. 1983); *Williams v. New Orleans, supra. See Youngblood v. Dalzell*, 804 F.2d 360 (6th Cir. 1986) which held that a decree was narrowly tailored because no qualified white was denied advancement and only *qualified* black candidates received promotions; *League of Martin v. City of Milwaukee*, 588 F.Supp. 1004 (E.D. Wis. 1984) (accelerated promotions of minorities were from among *qualified* applicants); *Local 93, supra*, 106 S.Ct at 3063 (consent decree was reasonable in that the plan did not require hiring of unqualified minority fire fighters.)

The decree's promotions of employees who have not demonstrated that they are qualified to be lieutenants in order to insure that racial "goals" are met is clearly "blind" and thus overbroad, and is not tailored to specific needs for qualified lieutenants.

2. Rigid Quotas The Court found that the "hiring goals and specific minority hiring requirements" set out in the decree were "highly flexible" (CR 922:49) and "meaningful." (CR 922:43) In order to reach this conclusion, the Court relied on the decree's own declaration that no provision shall be construed as a "quota." (CR 922:49) The Court also stated that "the requirement that the City justify a failure to meet a hiring goal does not make the goal a rigid quota." (CR 922:43) The Court also found that the "actual numbers of race-conscious appointments [were] modest" (CR 922:42) in light of the FEHC's assertion that if the numbers of minority appointments were reduced then the FEHC would

reconsider its decision to take no further action against the City. (CR 922:42)

The fact that the decree's goals were acceptable to the FEHC and not labelled as "quotas" does not exempt them from being actual quotas. The decree clearly established fixed quotas. It provided for manipulation of residency requirements, list durations, examination weights and seniority components. Paragraph 5 permitted a committee to override the Civil Service Provisions and the City Charter regarding seniority, educational credits, and other selection procedures. (CR 695:7-8) Paragraph 9(b) allowed the court to order additional steps where actions, although legal, proved inadequate to meet "goals." Consistent with a quota or ceiling, Paragraph 9(b) allowed the goal for femal hiring to be raised if it was discovered that there were additional qualified candidates. (CR 695:9-10) Paragraph 10 apparently intended to guarantee the appointment of a particular number of minority firefighters during the life of the decree in that it provided for the modification of the hiring goals if fewer than 500 hires occurred during its term. (CR 695:11)

The court also based its opinion that the goals were "flexible" on the provision in the decree that permitted adjustments to hiring goals if the hiring needs were altered by budget cuts and the like. (CR 922:50) But merely giving the City the option to change its quotas at a future date does not make the "goals" contained in the decree any less mandatory while they are effective.

3. Duration The Court found that a 7 year duration for the decree was "reasonable and necessary in view of the staggered testing schedule which is the heart of the decree." (CR 922:50) However, *Steelworkers v. Weber, supra,* and its progeny provide that voluntary affirmative action should be a "temporary measure . . . not intended to *maintain* a racial balance, but simply to eliminate a manifest racial imbalance." *Steelworkers v. Weber, supra,* 443 U.S. at 204 (Emphasis added). The decree's appointment of 33 minorities to the rank of lieutenant cures the racial imbalance in that rank. Therefore, maintenance of future goals for promotions to that rank for the 7 year duration of the decree is inappropriate under *Steelworkers v. Weber.*

Courts seem to be in general agreement that a consent decree should not last longer than 5 years. *See Martin v. Milwaukee, supra,*—5 year duration; *Local 93, supra,*—decree's life shortened from 9 to 4 years; *Black Grievance Comm. v. Phil. Elec. Co.*, 749 F.2d 1072 (3rd Cir. 1984)—5 year duration; *William v. New Orleans, supra,*—12 year duration improper as would span nearly entire career of many non-black officers. Thus the potential duration of the consent decree of up to 10 years is contrary to current authority. Moreover, such a duration is particularly unreasonable in light of the fact that the SFFD operated under the *WACO V* decree from 1977 until 1982, thus bringing the total number of years of judicial intervention and control to an unjustifiable 12-15 years.

4. Numerical Relationship The long term goals of the decree require the SFFD to hire women at the rate of 10% (half to be minorities) until women equal 10% of the sworn personnel, and to hire minorities at a rate of 55% until minorities represent 40% of sworn personnel. (CR 695:8-10)

The Court found that this numerical relief was "closely related to the relevant labor force," which it deemed to be the City and County of San Francisco. (CR 922:50) Once again the Court was influenced by the assertation that the FEHC would maintain its suit rather than accept the settlement provisions if the decree's numerical relief were any less. (CR 922:51)

In response to the Union's contention that the numerical hiring provision was not narrowly tailored enough because the particular minority firefighters to be promoted from the 1984 lieutenant exam were never harmed by that exam because it was deemed invalid and cancelled (CR 922:52) the Court held that the promotions from this list were *not* a remedy for "any harm caused by the 1984 test," and that the list was being used "only as a better than arbitrary means of generating a list of firefighters eligible for promotion." (CR 922:52-53) If the promotions from this list were not meant to remedy any harm caused by *that* invalid exam, then this remedy was not tailored to anything at all. The 1984 test was invalid, but the Court pointed to no other violation or discrimination for which use of the invalid exam was tailored, except to accelerate the promotion of lieutenants in the

SFFD at the expense of promoting potentially unqualified persons. The City expressed no urgent need for immediate promotions and, in fact, has expressed concern that too many lieutenants may have been promoted from the 1984 list. (CR 847:25) The City and the SFFD have maintained that they have operated effectively for years without permanent appointments. As many testified at the fairness hearing on 12/22/87, the interests of all would be better served by the careful development of a valid lawful selection procedure than by the accelerated race-conscious remedies of the decree, which mandate the appointment of individuals of questionable qualifications. Unlike the interim hiring pursuant to the court's 2/26/87 injunction, which was in response to a staffing crisis, these accelerated lieutenant promotions have not been shown to be necessary at all.

5. Trammels Non-Minorities The Court held that "the terms of the decree do not unnecessarily trammel the rights or uproot the legitimate expectations of non-minority or male employees and therefore do not impose an unacceptable burden." (CR 922:52) As evidence that no such trammeling resulted, the Court looked at the fact that the decree imposed no layoffs, nor did it impose an "absolute bar" to the advancement of white males. (CR 922:52)

In response to the Union's objection that the decree unnecessarily trammeled the rights of white employees in that it nowhere required the promotion of any white males along with others promoted, the Court stated that the City could not be required to promote any white males because there has been no showing of discrimination among that group. Certainly there is rarely a showing of discrimination against a group of white males, yet whether their legitimate rights are *unnecessarily* trammelled in an attempt to assist those who have been the victims of discrimination is a matter which the Court was required to take into account in determining whether the Consent Decree is properly tailored and not overbroad.

To the extent the decree required promotion of minorities only, it patently created an absolute bar to the advancement of whites. The provision that up to 36 whites and 12 additional minorities *may* be promoted does not cure this problem. In view of the facts

that: (a) there was no demonstrated or urgent need to make promotions before the new examinations were ready; and (b) there was no justifiable basis for making a total of 75 promotions (27 and 48) from a concededly invalid list with only 415 names and no established pass rate, the Court erred in approving the decree on the ground that there existed an inchoate possibility that as many as 36 whites could be appointed. As indicated above, unless individual victims of discriminatory practices can be identified, there in no authority permitting promotion of minorities in greater than a one-to-one ratio, which is the effect of this decree. *See U.S. v. Paradise, supra.*

6. Uprooted Expectations The Court did not discuss whether the decree uprooted any legitimate expectations of non-minorities. The Union, however, contends that it did. Non-minority firefighters as well as minority firefighters certainly have an expectation of growth within their careers in reward for good performance, and this means promotions when they are deserved. To promote quotas of minorities from invalid exams when no pressing need existed for such immediate promotions certainly uprooted the expectations of non-minority firefighters that they might be promoted on the basis of valid exams when a real need arose. Instead, these non-minorities were placed at the lowest promotional priority, a measure seen by them as "punitive." Certainly this type of treatment will not encourage them to continue to perform at their best, to take outside courses in order to qualify for promotions, and to compete legitimately within the department for the earned "reward" of promotions. Firefighter O'Shea, who had been with the SFFD for 13 years as of 12/22/87 and had taken the 1984 lieutenants' exam, testified at the fairness hearing that although there were only 1.4 points between him and the last non-minority firefighter promoted by the decree, there were 183.72 points between him and the last minority firefighter promoted by the decree. (CR 847:118) This discrepancy does not evidence a promotional scheme narrowly tailored to the needs of the SFFD, nor does it protect in any way the legitimate expectations of firefighters such as O'Shea.

The District Court clearly abused its discretion in finding the terms of the decree narrowly tailored to achievement of racial and gender-based balance within the SFFD.

C. The District Court Abused Its Discretion By Approving A Consent Decree Which Was Not Shown To Be Fundamentally Fair, Adequate And Reasonable

Although settlement of a Title VII suit is naturally encouraged, a district court cannot summarily approve such a settlement. An independent decision must be made in each case concerning the fairness of every provision in the decree; thus courts have articulated procedures for approving consent decrees. *See U.S. v. Paradise, supra,* 107 S.Ct. at; *Williams v. Vukovich,* 664 F.2d 441 (6th Cir. 1983); *Moore v. City of San Jose,* 615 F.2d 1265, 1271 (9th Cir. 1980).

Where, as here, the decree affects third parties, the court must also carefully scrutinize the decree with respect to their rights and can approve the decree only if its effect on those parties is reasonable and not proscribed. *Williams v. Vukiovich, supra.* Determinations of reasonableness are generally made after a hearing has been held. *U.S. v. Paradise, supra,* 107 S.Ct. at 1053; *Kirkland v. Dept. of Correctional Svcs.,* 711 F.2d 1117 (2nd Cir. 1983); *EEOC v. Hiram Walker, supra; Williams v. New Orleans, surpra.*

A "fairness hearing" is a forum for all interested parties to comment on the proposed decree. The ultimate issue the court must decide at the conclusion of the hearing is whether the decree is "fair, adequate and reasonable." *See Officers for Justice, supra,* 688 F.2d at 625. The court has no occasion at the fairness hearing to determine the merits of the controversy or the factual underpinnings of the legal authorities advanced by the parties; it does have a mandatory duty to consider the adequacy of the settlement to the class; the fairness of the decree to those affected; and the public interest. *Williams v. Vukovich, supra,* and cases cited therein.

The bulk of the 113 objections filed with the Court in opposition to the Consent Decree went to the general issue of fairness. At the hearing Judge Patel categorically reviewed these objec-

tions, and then permitted counsel to address them. In addition, counsel were permitted to call upon individual interested and affected persons to testify concerning their opinions as to fairness of the decree. (CR 847:5-129) In light of the evidence in the record, and the objections and testimony presented on 12/22/87, it is clear that the court abused its discretion in finding the Consent Decree "fundamentally fair, adequate, and reasonable."

1. The District Court Erred In Finding That The Decree's Lieutenant Promotional Provisions Were Fair And Reasonable

(a). The Immediate Promotion To Lieutenant Of Six Black Firefighters From The 1978 H-20 Eligibility List Was Not Fair And Reasonable

Paragraph 11 of the decree provided that the SFFD "immediately appoint Robert Demmons, Audry Lee, Jimmie Braden, Worthy Brooks, Tyrone Rocket, and Bernie Wangara to the position of permanent fire lieutenant with a retroactive date of appointment of 3/9/79 . . ." (CR 695:11) In addition, the decree required the administration of a special captains' exam for the benefit of these 6 Black firefighters by 4/1/88. The pre-existing order freezing promotions from the captain's list was to be lifted as soon as the results of the make-up captains' test were integrated and correlated into the existing eligibility list. (CR 695:12)

The Court found that these provisions for the promotion of these 6 Black firefighters to lieutenant (and possibly captain) were fair in order to "remedy the adverse impact of the 1978 H-20 lieutenants' exam" (CR 922:41), despite the fact that the Court held in its 5/25/88 (ancillary) order that the decision of the Court of Appeal holding that the 1978 H-20 exam was invalid and discriminatory would have a preclusive effect on this litigation. (CR 916:2, referring to *CCSF v. FEHC*, 191 Cal.App.3d 976 (1987))

At the fairness hearing the objection was raised that the decree provided for the retroactive promotion of Black lieutenants from the invalid 1978 exam, but made no provision for any others (minorities or whites) also adversely affected by this same invalid exam. (CR 847:12)

The 1978 lieutenants' exam was found to be a valid exam for the purpose of testing job knowledge but not supervisory skills. The decree's immediate promotion of the 6 named Black firefighters did not provide for any testing or assurances of the supervisory skills required by lieutenants. Thus in its haste to remedy the lack of minority promotions during the period of this invalid 1978 exam, the decree focused on Blacks to the exclusion of other minorities, and provided for promotions without assuring that those promoted would be qualified.

(b). The Immediate Lieutenant Promotions Based upon The 1984 Lieutenant Examination Were Not Fair And Reasonable

Paragraph 16 of the decree provided that:

> Within 60 days of the execution of this Decree . . . the Department shall promote 11 Black firefighters (in addition to those appointed. . . [via Paragraph 11], 8 Hispanic firefighters, and 8 Asian and Filipino firefighters . . . to positions as fire lieutenants. These promotions shall be made from the lists generated as a result of the 1984 examination for the position of fire lieutenant, selecting those for promotion who scored highest on said examination. (CR 695:16-17)

Paragraph 16 of the decree also permitted the City to fill "up to 48 existing vacancies in the rank of fire lieutenant with persons who took the 1984 H-20 examination, choosing the persons who scored highest on that examination." (CR 695:17) The decree also required that minorities comprise 25% of these additional lieutenant promotions, with each minority group receiving its pro-rata share of such appointments. (CR 695:17) Thus if all 48 positions were to be filled, those appointed would include 5 Blacks, 5 Hispanics, and 2 Asians and Filipinos.

The court enthusiastically approved the promotions from the invalid 1984 lieutenant exam, stating tht this provision "will act to stem the shortage of lieutenants and to get qualified minority firefighters quickly into the upper ranks after 20 years of virtual exclusion. It will also be an opportunity for promotion for a

number of firefighters, many of whom will be white, who have long waited for promotions." (CR 922:41)

On 2/26/87 the District Court granted plaintiffs' and plaintiff-intervenors' motion for summary judgment on the issue of invalidity of the 1984 lieutenant exam. This test and its resulting eligiblity list were cancelled by the Civil Service Commission. *See U.S. v. CCSF*, 656 F.Supp 276 (N.D. Cal. 1987).

At the fairness hearing the Union objected to the decree's promotion of lieutenants from the invalid 1984 lieutenant exam as "unfair" for the following reasons:

Deprives Qualified Candidates. Because, as the Court admitted, those who "passed" the 1984 H-20 test were "not demonstrably more qualified to perform the job of fire lieutenant" than those who "failed" (CR 922:40), those who failed may have been quite qualified. To now make selections based upon the scores achieved on this exam is to obviously deprive potentially qualified candidates of a promotion.

Promotes Potentially Unqualified Candidates. The immediate promotion of lieutenants from the 1978 H-20 exam list or the 1984 H-20 list results in the promotion of firefighters who have not been proven qualified to act in the supervisory role of lieutenant. This may result in morale and resentment problems in the Department when firefighters have to serve under a lieutenant not proven qualified. (*See* CR 847:88, 109-110) The Court sidestepped this very real concern by stating that "the decree specifically provides that no one who is not qualified shall be hired or promoted according to its terms." (CR 922:40) The immediate lieutenant promotions from the 1978 and 1984 exams clearly contradict the decree's professed abhorrence of promoting unqualified persons. In fact, the Court itself recognized the reality of morale problems which can arise when appointments are made before qualifications are proven. In its 2/26/87 injunction, the District Court stated "[p]ermanent appointments may carry a stigma and pose morale and resentment problems . . ." (CR 426:30, citing *United States v. New Jersey*, Nos. 950-73, 77-254, 79-184, slip.op. at 4 (D.N.J. Oct. 14, 1986)) The Court would not "promote" the SFFD's provisional, interim firefighters

hired from an invalid eligibility list without first re-testing them. Yet this is in essence what the Consent Decree proposed to do in its lieutenant promotion provisions. Moreover, the decree directly contradicted the Court's 2/26/87 permanent injunction, which contained the provision that "Defendants shall not adopt any eligilibity list nor make any appointments in an acting, provisional or permanent basis to the ranks of . . . fire lieutenant (H-20) which are based in any way on selection procedures developed and administered pursuant to the 1984 job announcement for those ranks." (CR 426:33)

The Court stated that promotions from the 1984 lieutenant exam, admittedly *not* an accurate indicator of qualified candidates, were preferable to an "arbitrary" list. (922:42) There is no real difference, however, between scores non-reflective of any qualifications and an arbitrary list. Moreover, even a truly arbitrary list wouldn't selectively and unfairly deprive a certain group (those who scored low on the invalid test) from promotional opportunities.

The Consent Decree provided for the consideration by the City of "work history" and "performance evaluations," along with a candidate's race and score on the 1984 lieutenant exam, in determining promotions. Neither work history nor performance as a firefighter have been shown related to a candidate's ability to act in a supervisory role. (CR 922:42) It is ironic that the decree assigned to the City the task of evaluating a candidate's work experience and performance, when the City has itself never been shown to be qualified to perform this type of evaluation properly. Part of the reason the District Court approved the decree was that it found, in light of the City's past inability to develop and implement valid and non-discriminatory examinations and employee evaluation procedures, that the City required court supervision to perform these tasks in the future. (CR 922:38) Moreover, the Court specifically found no evidence of "good faith" by the City in its prior attempts to come up with valid employee selection procedures. (CR 922:46) Hence, the approval of a decree which "safeguards" against the promotion of unqualified persons by delegating to the City the task it has previously

been unable to perform of-assessing such qualifications on "job performance" was an abuse of discretion.

2. The District Court Erred In Fnding That The Consent Decree's Provision Prohibiting Promotions Of Title VII Violators Was Adequate And Reasonable

Paragraph 16 of the decree concluded by stating that "[n]o person found by the Court to have violated the Civil Rights Acts of 1866, 1871, or 1964, as amended in 1972, and the State and Local Fiscal Assistance Act while employed by the SFFD shall be promoted to lieutenant pursuant to the provisions of this paragraph [which based immediate promotions on the 1984 H-20 exam]. (CR 695:17)

The District Court found that this provision was "eminently fair" because it would be "patently unjust to allow those who had violated the civil rights laws to benefit from a decree that is intended to redress those violations." (CR 922:42)

No legal precedent supports such an ad-hoc judicially-imposed punitive measure. If an employee of the SFFD has committed a "civil rights" violation, complaints can be made and handled through the applicable legal channels, and subsequent punishment, if imposed, would be tailored to fit the nature and severity of the violation.

The Consent Decree provided no framework for determining what behavior would be prohibited, and punished all violations, whether they be outrageous or minimal, with the same penalty (i.e. deprivation of all future promotional opportunity). This provision is an unwarranted, and more than grossly unfair, interference with the City's internal promotional scheme and individual employees' legitimate employment interests.

3. The District Court Erred In Finding That The Decree's Provisions Regarding Consideration Of Educational Credits Or Seniority In Determining Promotions Were Fair

Paragraph 5 of the decree provided that "[i]n promotional examinations, the test development committee shall determine whether points shall be awarded on the basis of seniority and/or

education . . . [n]otwithstanding applicable provisions of the City Charter . . ." (CR 695:7)

The District Court found that educational credits "have not been shown to be job-related," and that to take seniority into account "would only serve to confirm rather than to remedy past discrimination." (CR 922:40) The Court failed to consider education that is job-related, and seniority earned by minorities.

4. The District Court Erred In Finding That An Unrealistic Testing Schedule Was An Inconsequential Factor In Evaluating The Fairness Of The Consent Decree

Paragraph 13 of the Consent Decree set forth a schedule of promotive examinations which were to begin 12/31/88 and end on 12/31/94 (at the end of the decree's 7-year term). (CR 695:13-15) The schedule was not randomly designed; its specific purpose was "to maximize the opportunity for advancement and promotion of all members of the SFFD, particularly minority persons and women." (CR 695:15)

In its Memorandum the District Court found that it "may already have proven too true" that the testing schedule was unrealistic. (CR 922:40) The Court then stated that this problem was "not grounds for invalidating the decree." (CR 922:40-41)

In determining overall fairness, the Court should look at each provision of the decree. *U.S. v. Paradise, supra; Moore v. San Jose, supra.* However, nowhere is it suggested that any one provision alone is dispositive on the issue of fairness. If the unreasonableness of a testing schedule is not in and of itself adequate grounds for disapproval of a settlement, it should at least be given some weight in determining overall fairness.

The decree stated its purpose for the schedule. If such purpose, apparently applauded by the court, is thwarted by an unrealistic schedule, then "unfairness" may result. The last scheduled test(s) may not occur at all during the life of the decree. If a court determines the decree is problematic, it should inform the parties of its precise concerns and give them an opportunity to reach a reasonable accommodation. *Williams v. Vukovich, supra.*

and cases cited therein. The Court erred in choosing to dismiss this admitted defect as inconsequential.

5. The District Court Erred In Basing Its Finding That The Terms Of The Consent Decree Were "Fair" In Part Upon Unsubstantiated, Irrelevant Factors

In addition to the reactions of the interested parties presented at the 12/22/87 fairness hearing, the District Court apparently also relied upon other "factors" never mentioned by the parties or interested persons in concluding that the terms of the Consent Decree were "fair, adequate, and reasonable." Factors mentioned by the Court included "the strength of the plaintiffs' case; the risk, expense, complexity and likely duration of further litigation; and the extent of discovery and stage of proceedings." (CR 922:29, citing—*Officers for Justice, supra,* at 625)

The court did not correlate any specific terms of the decree with its consideration of any of these additional factors. Instead, the court summarily concluded that (1) the plaintiff-intervenors' case was "strong;" (2) the risks for the City of continuing the litigation were "many;" (3) the City "revealed that its primary motive in negotiating and agreeing to the consent decree was to avoid the risk that the court would make a finding of intentional discrimination after trial;" (4) that a trial "on the harassment issues [would] have been long, complex and costly;" and (5) that the "general publication of the evidence at trial . . . would almost certainly have been extremely embarrassing and demoralizing to the SFFD." (CR 922:38-39)

The District Court did not explain why these "findings" rendered the decree's specific terms "fair." Furthermore, the Court didn't point to any specific or substantial factual evidence to support these conslusions. to support its statement that the plaintiff-intervenors' case was strong, the court referred to the fact that the City has been unable to produce validated hiring and promotional tests. However, the terms of the decree presume that valid tests are currently being developed, and the "plaintiff-intervenors' case" is thus limited to harassment claims, the strength of which was only alluded to through a "monitor's report" which dealt only with one incident, which was still under

litigation. (CR 922:20, 38) To support its conclusion that the risks to the City of continuing litigation were "many," the court made the unsupported assumption that merely because the City wanted to settle, the risks of litigation were "onerous," and evidence to be presented at trial would be "extremely embarrassing and demoralizing" to the SFFD. (CR 922:39) The court only hinted that such horrible evidence had been "previewed at various pretrial proceedings." (CR 922:27)

Neither the City, the SFFD, nor plaintiff-intervenors brought forth these factors in support of the decree at the fairness hearing on 12/22/87. These unsubstantiated "facts" may be relevant to the issue of the desirability of settlement versus litigation, but the District Court clearly abused its discretion in relying on them to support a finding that the terms of the Consent Decree were fair, adequate, and reasonable.

D. The District Court Had Jurisdiction To Hear Local 798's Motion For Injunctive Relief Regarding The Seniority Assigned To Lieutenants Promoted Under The Consent Decree And Should Have Granted That Motion.

Because the District Court prematurely foreclosed the submission of evidence on Local 798's motion for injunctive relief regarding the seniority to the 76 lieutenants who were promoted on 6/30/88, the evidence on that issue was submitted directly to this Court in connection with a motion for a stay order which Local 798 filed on October 5, 1988. That evidence established that the method by which these 76 employees were assigned seniority in the rank of lieutenant was as follows: three separate lotteries were held, one for the eleven (11) highest Black applicants on the eligibility list resulting from the 1984 promotional exam for that rank, a second combining the eight (8) highest Asian and eight (8) highest Hispanic lieutenants, and a third for the remaining forty-nine (49) applicants. The eleven Black applicants received the highest seniority in the rank of lieutenant, with seniority among those applicants determined on the basis of the lottery that was limited to those applicants. The sixteen Asian and Hispanic lieutenants were then assigned seniority below the Black applicants based on the results of the second lottery, which was limited to those applicants. Finally, the remaining forty-nine

applicants were assigned seniority below the pool of sixteen Asian and Hispanic applicants on the basis of the third lottery. No provision of the consent decree authorizes the assignment of seniority in a race-conscious manner to employees promoted in accordance with the terms of that decree. The assignment of seniority to these employees in a race-conscious manner was never presentd to the District Court at a "fairness hearing" to determine whether that action would unnecessarily trammel the interests of non-minority employees.

Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 559, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984) holds that where a consent decree manifests no intention to depart from an existing seniority system, such a departure cannot be made in the guise of implementation of that decree. *Dawson v. Pastrick,* 600 F.2d 70, 75 (7th Cir. 1979) holds that a union intervenor has standing to protect the seniority interests of its members in an action seeking affirmative relief for minority employees who have allegedly been the victims of discrimination in their employment. *Bushey v. N.Y. Civil Service Com.,* 733 F.2d 220 (2d Cir. 1984) holds that a public employer may not agree to grant race-conscious privileges as part of the resolution of employment discrimination litigation unless that matter has been submitted to the District Court for approval at a "fairness hearing." *Local Number 93, International Association of Firefighters, AFL-CIO v. City of Cleveland, supra,* ____ U.S. ____, 106 S.Ct. 3063 holds that a District Court's approval of a consent decree does not dispose of the valid claims of intervenors. Hence, Judge Patel was clearly in error in her conclusions that Local 798 had no standing to challenge the assignment of seniority in a race-conscious manner to employees promoted under the consent decree and that the City was free to assign seniority in that manner without prior judicial approval.

The City's contention that the District Court had no jurisdiction to hear Local 798's claim and that Local 798 must file an entirely new lawsuit over this matter in order to bring it before the court is also clearly in error. Under the doctrine of ancillary jurisdiction the federal courts have jurisdiction over all proceedings ancillary to the principal action, "regardless of the citizenship of the parties, the amount in controversy, or any other factor that

normally would determine subject matter jurisdiction." Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3523. "The situations in which ancillary jurisdiction has been invoked include proceedings involving attorneys' fees, bankruptcy, settlement agreements, suits by receivers, and injuction, among others." *Id.* [T]he concept is a common-sense solution to the problems of piecemeal litigation that otherwise would arise by virtue of the limited jurisdiction of the federal courts prescribed in Article III and the complexity of many modern lawsuits." *Id.* Accordingly, since the manner of assignment of seniority to employees promoted to Lieutenant under the consent decree is a matter ancillary to the approval and supervision of that decree by the District Court, the District Court has jurisdiction to hear Local 798's objections on that issue.

VI

CONCLUSION

For the reasons set forth above Appellant Local 798 respectfully requests that this Court vacate and reverse the May 25, 1988 and June 10, 1988 orders of the United States District Court for the Northern District of California approving the Consent Decree in these consolidated actions and that this Court direct the District Court to take such actions as are necessary to place the parties in the positions they would be in if that decree had never been implemented. Local 798 further requests that this Court reverse the District Court's order permitting Defendant City to assign seniority to the 76 lieutenants who were promoted on 6/30/88 in a race-conscious manner.

VII

STATEMENT OF RELATED CASES

All of the following appeals arise out of this same case. Docket numbers 88-2735 and 88-2884 (appealed herein), along with 88-15015 (briefed separately), are appeals from the consent decree approved by the District Court on 6/10/88. Docket number 1905 is an appeal from a District Court order entered 2/5/88 enjoining discriminatory behavior on the part of the SFFD. Docket numbers 88-15473 and 88-15474 are appeals from an order of the District Court regarding the seniority assigned to employees appointed pursuant to that consent decree.

Dated: December 23, 1988

DAVIS, RENO & COURTNEY

By: DUANE W. RENO
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PROOF OF SERVICE BY MAIL

I declare that I am over the age of eighteen, not a party to the within action and that my business address is 90 New Montgomery Street, Suite 909, San Francisco, California 94105.

On December 23, 1988 I served the within BRIEF OF APPELLANT on the following party(s) by placing a true copy thereof in the U.S. Mail at San Francisco, California, fully posted and addressed as follows:

See Attachment A

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed at San Francisco, California on this 23rd day of December 1988.

GRANIA B. DUFFY

Grania B. Duffy

(4)

No. 90-248

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SAN FRANCISCO FIRE FIGHTERS LOCAL 798,
INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, AFL-CIO,
Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,
FONTAINE DAVIS, *et al.*,
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY BRIEF

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IN THE

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OCTOBER TERM, 1990

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v.

CITY AND COUNTY OF SAN FRANCISCO,
FONTAINE DAVIS, *et al.*,
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITIONER'S REPLY BRIEF

I. INTRODUCTION

Petitioner San Francisco Fire Fighters Local 798, International Association of Fire Fighters, AFL-CIO, submits this Reply Brief to address arguments first raised in the briefs in opposition to its petition for a writ of certiorari, to wit: whether Petitioner Local 798 is barred by a failure to raise the issues below from requesting review by this Court of, first, the appropriate standard of appellate review on appeal by adversely affected nonminority employees of a District Court order approving a consent decree in an employment discrimination lawsuit and, second, whether the population of the

City and County of San Francisco is the relevant labor market for purposes of establishing a *prima facie* case of employment discrimination in the San Francisco Fire Department. For the following reasons, this Court should conclude that both of those issues properly may and should be brought before it for decision.

II. THE PROPER STANDARD OF APPELLATE REVIEW IN THIS EMPLOYMENT DISCRIMINATION LAWSUIT IS AN ISSUE THAT CAN AND SHOULD BE CONSIDERED BY THIS COURT BECAUSE THE DECISION IN *METRO BROADCASTING, INC. v. FEDERAL COMMUNICATIONS COMM'N*, —— U.S. ——, 110 S.CT. 2997, CONSTITUTED AN INTERVENING, SUBSTANTIAL CHANGE IN THE CONTROLLING LAW ON THIS POINT AFTER THE DECISION OF THE COURT OF APPEALS

At the time of the proceedings before the Ninth Circuit Court of Appeals in this employment discrimination lawsuit, the Ninth Circuit and every other Court of Appeals to consider the point had consistently applied the very liberal "abuse of discretion" standard of appellate review where, as here, a District Court had upheld a municipal employment program which embraced hiring and promotional preferences based on race but which was embodied in a consent decree rather than in a statute or ordinance. *Davis v. City and County of San Francisco*, 890 F.2d 1438 (9th Cir. 1989), Appendices to Petition for Writ of Certiorari, pp. 1a-27a; *Kirkland v. N.Y. State Dept. of Correctional Services*, 520 F.2d 420, 429-430 (2d Cir. 1975); *Ass'n. Against Discrimination v. City of Bridgeport*, 647 F.2d 256, 278-279 (2d Cir. 1981), *cert. den.*, 455 U.S. 988 (1982); *Berkman v. City of New York*, 705 F.2d 584, 597 (2d Cir. 1983); *Moore v. Nat'l Assn. of Securities Dealers, Inc.*, 762 F.2d 1093, 1106 (D.C. Cir. 1985); *Williams v. City of New Orleans*, 729 F.2d 1554, 1558-1559 (5th Cir. 1984) (discussing case of *United States v. City of Alexandria*,

614 F.2d 1358 (5th Cir. 1980) as an "exceptional circumstance" to the Fifth Circuit's "expressed preference" for the abuse of discretion standard of review); *Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 555 (6th Cir. 1982), *cert. granted, Firefighters Local No. 1784 v. Stotts*, 462 U.S. 1105, rev'd 467 U.S. 1105; *Vanguards of Cleveland v. City of Cleveland and Local 93 I.A.F.F., AFL-CIO*, 753 F.2d 479, 484 (6th Cir. 1985), *cert. granted, Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 474 U.S. 816, aff'd 478 U.S. 501 (1986); *Armstrong v. Bd. of School Directors, Etc.*, 616 F.2d 305, 313-314 (7th Cir. 1980); *South v. Rowe*, 759 F.2d 610, 613 (7th Cir. 1985).

The Ninth Circuit rendered its decision in this appeal on December 4, 1989, and its decision denying rehearing on May 9, 1990. One and one-half months later, on June 27, 1990, this Court held in *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, —— U.S. ——, 110 S.Ct. 2997, that a different standard of judicial review is applicable to "benign" race-conscious employment programs adopted by the Congress than to racial employment preferences adopted by state and local governments. The Court explained that whereas deference is to be given to racial classifications employed by Congress because it is a co-equal branch of government, "strict scrutiny" is to be applied to race- and gender-conscious employment programs adopted by state and local governments because there is "a heightened danger of oppression from political factions in small, rather than large, political units" and a more significant likelihood that municipal governments will be used as instruments of discrimination. *Id.*, 110 S.Ct. at pp. 3008-3009.

Until this distinction was made clear in *Metro Broadcasting*, it was not readily apparent that the uniform application by the Courts of Appeals of the "abuse of discretion" standard of appellate review to consent decrees which embrace hiring and promotional preferences in

municipal employment based on race was in error. For this reason and because *Metro Broadcasting* was decided after the decision of the Ninth Circuit in this appeal, it necessarily follows that *Metro Broadcasting* constituted an intervening, substantial change in the controlling law on this point.

An intervening, substantial change in the controlling law is an "exceptional circumstance" which permits this Court to consider an argument not previously raised in the lower courts. *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 896 n.7 (1984); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320-321, and n.6 (1971). Accordingly, even though Petitioner Local 798 did not raise the issue in the proceedings before the Ninth Circuit of the proper standard of appellate review of consent decrees which embrace racial preferences in municipal employment, that issue may properly be reviewed by this Court.

Respondents also contend that the Court should decline to review this issue because the standard of review actually applied by the Ninth Circuit was "strict scrutiny" rather than "abuse of discretion." However, although the decision of the Ninth Circuit appears to purport in some instances to apply "strict scrutiny," the Ninth Circuit failed to recite a comprehensive analysis and explanation of the manner in which the affirmative, race-conscious relief of the consent decree was narrowly tailored to remedy only those claims of discrimination which were supported by the evidence but instead summarily concluded that the evidence before the District Court was sufficient to justify such relief.[1] Similarly, the Ninth Circuit made no meaningful analysis of the issue of whether minority firefighters were being granted pro-

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[1] The Ninth Circuit failed to analyze or explain, for example, the connection, if any, between the provision of the consent decree for the promotions of 13 Hispanic employees and 10 Asian employees to the rank of Lieutenant and the District Court's finding of past discrimination against Black candidates for promotion to that rank.

motions under the decree without any legitimate verification that they were actually qualified for those promotions.[2] It is thus clear that the Ninth Circuit did not make its own, independent application of the law to the facts. Instead, the Ninth Circuit merely examined the decision of the District Court to determine whether the District Court had applied the correct principles of law (i.e., "strict scrutiny") to the facts. The standard of appellate review actually applied by the Ninth Circuit was thus much less exacting than the "strict scrutiny" standard of review, and amounted in effect to the "abuse of discretion" standard of review. This is confirmed by the concluding paragraph of the Ninth Circuit decision, which states in pertinent part:

> The district court did not abuse its discretion in concluding that the consent decree is fundamentally fair, adequate and reasonable and comports with the equal protection provisions of the fourteenth amendment and the requirements of Title VII.

890 F.2d at p. 1452; Appendix A To Petition For Writ Of Certiorari, p. 27a.

For these reasons and for the reason that a compelling need exists for consistency in the standard of appellate

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[2] The District Court justified the provisions of the consent decree for the promotion of 39 minority candidates who had taken the 1984 promotional examination for the rank of Lieutenant on the ground that each candidate's work history and performance evaluations would be examined to ensure that the candidate was qualified for promotion. 696 F.Supp. at p. 1306; Appendix B to Petition For Writ Of Certiorari, pp. 67a-68a. The plaintiffs themselves had successfully contended, however, that no promotional selection procedure can adequately assess the qualifications of a candidate for promotion to the rank of Lieutenant unless that selection procedure tests supervisory skills and abilities. *See City and County of San Francisco v. Fair Employment and Housing Comm'n*, 191 Cal.App.3d 97 (1987). Examination of each candidate's work history and performance evaluations would not constitute a test of the candidate's supervisory skills and abilities, and thus could not ensure that the candidate was qualified for promotion.

review that is to be applied to municipal employment programs which provide preferential treatment for females and minorities, this Court should grant the petition for a writ of certiorari and direct the Courts of Appeals that they are not merely to observe whether the District Courts apply "strict scrutiny" to such programs but are instead to independently apply "strict scrutiny" themselves to all such programs, regardless of whether those programs are the products of ordinances or consent decrees.

III. THE ISSUE OF WHETHER THE NINTH CIRCUIT IMPROPERLY USED THE CITY AND COUNTY OF SAN FRANCISCO AS THE RELEVANT LABOR MARKET TO DETERMINE WHETHER PLAINTIFFS ESTABLISHED A *PRIMA FACIE* CASE OF EMPLOYMENT DISCRIMINATION IN THE SAN FRANCISCO FIRE DEPARTMENT IS ALSO PROPERLY BEFORE THIS COURT FOR DECISION

With regard to respondents' contention that Petitioner Local 798 also failed to raise the issue below of whether it was error to use the City and County of San Francisco as the relevant labor market to determine whether plaintiffs established a *prima facie* case of employment discrimination in the San Francisco Fire Department through statistical imbalances, respondents have neglected to inform the Court that this issue was the primary subject of the Petition For Rehearing And Suggestion For Rehearing En Banc which Petitioner Local 798 filed with the Ninth Circuit on December 26, 1989. A copy of that Petition For Rehearing is attached as an appendix to this Reply Brief. Petitioner Local 798's argument on this issue is set forth at pp. 2-6 (pp. 6a-9a of the appendix).

Petitioner Local 798 contended in the objections to the consent decree which it filed in the District Court that it would be improper to find a *prima facie* case of employment discrimination on the basis of a comparison of

the racial and ethnic composition of the population of the City and County of San Francisco to the racial and ethnic composition of the workforce of the San Francisco Fire Department. (Appendix F to Petition For Writ Of Certiorari, pp. 191a-194a). The District Court apparently recognized that this objection was well taken. As noted at p. 15 of the Brief Of The City And County Of San Francisco In Opposition To The Petition For Writ Of Certiorari, when the District Court came to the conclusion that the facts before it were sufficient to establish a *prima facie* case of employment discrimination sufficient to justify the affirmative, race-conscious relief imposed by the consent decree, it did not rely upon a comparison of the population of the City and County of San Francisco to the workforce of the San Francisco Fire Department. Instead, the District Court came to this conclusion on the basis of the adverse impact of the Department's hiring practices on the actual pool of qualified applicants.[3] *United States v. City and County of San Francisco*, 696 F.Supp. 1287, 1307-1308 (N.D. Cal. 1987); Appendix B to Petition For Writ Of Certiorari, p. 70a. Because the District Court did not decide the issue of whether the City and County of San Francisco is the relevant labor market for the purpose of establishing a *prima facie* case of employment discrimination in the San Francisco Fire Department through statistical imbalances,[4] that issue was not included in the issues

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[3] Petitioner Local 798 contends that this was error because the adverse effects of these hiring practices on minority candidates had already been remedied by the District Court's order of February 26, 1987. Petition For Writ Of Certiorari at pp. 23-25.

[4] Although the District Court discussed the union's contention that the relevant labor market was the population of the Standard Consolidated Statistical Area, which includes the nine counties surrounding San Francisco as well as the City, that discussion dealt with the issue of whether the affirmative, race-conscious relief was narrowly tailored to the specific employment practices that have been found unlawful rather than with the issue of whether the evidence before the District Court would establish a *prima facie*

presented to the Ninth Circuit for decision on Petitioner Local 798's appeal of the consent decree. Inexplicably, however, the Ninth Circuit interpreted the District Court's decision to hold that

> the statistical disparities between the numbers of minorities and women hired in the fire department and the numbers of minorities and women residing in the City constituted a "strong basis in evidence" sufficient to establish a *prima facie* case of past discrimination . . . .

890 F.2d at pp. 1446-1447; Appendix A To Petition For Writ of Certiorari, p. 14a.

Thus, the Ninth Circuit did not uphold the consent decree on the basis of the statistical evidence relied upon by the District Court, namely, the adverse impact of the Department's hiring practices on the actual pool of qualified applicants, but instead upheld the consent decree on the basis of different statistical evidence, namely, a comparison between the proportion of women and minorities in the population of the City and the proportion of women and minorities in the Fire Department workforce. Since Petitioner Local 798 could not reasonably have anticipated that the Ninth Circuit would base its decision on different statistical evidence than that relied upon by the District Court, the union should not be held to have failed to preserve its right to present argument on this issue to the Ninth Circuit, or to present that issue to this Court for decision, merely because the union did not address that issue in the Ninth Circuit until its Petition For Rehearing.

For all of these reasons and for the reason that the decision of the Ninth Circuit is squarely in conflict with the decisions of other Courts of Appeals on the same is-

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case of unlawful employment discrimination sufficient to justify the imposition of any relief at all. 696 F.Supp. at pp. 1308-1309; Appendix B To Petition For Writ Of Certiorari, pp. 71a-73a.

sue, this Court should grant the petition for a writ of certiorari and reverse the Ninth Circuit's decision that a *prima facie* case of employment discrimination can be established merely by a comparison between a municipal employer's workforce and the city's population.

CONCLUSION

For all of the reasons stated above, there is no merit to respondents' contentions that the issues presented in this petition for a writ of certiorari are not properly before the Court for review.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 88-1905
88-2735
88-2884
88-15473
88-15474
(Consolidated)

U.S.D.C. Nos. C84-1100 MHP & C84-7089 MHP

FONTAINE DAVIS, *et al.*,
Plaintiffs-Appellees,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant-Appellee,

SAN FRANCISCO FIRE FIGHTERS, LOCAL 798,
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
AFL-CIO,
Defendant-Intervenor-Appellant.

UNITED STATES OF AMERICA,
Plaintiff,

and

FONTAINE DAVIS, *et al.*,
Plaintiffs in Intervention/Appellees,

v.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendants-Appellees,

SAN FRANCISCO FIRE FIGHTERS, LOCAL 798,
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
AFL-CIO,
Defendant in Intervention/Appellant.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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I. INTRODUCTION AND STATEMENT OF COUNSEL.

Defendant-Intervenor-Appellant SAN FRANCISCO FIRE FIGHTERS LOCAL 798, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, respectfully requests that a rehearing be granted in this appeal.

This request for a rehearing is made on the grounds that, first, the decision which the Court rendered in this appeal on December 4, 1989, overlooked material points of fact and law and, additionally, this decision is in clear conflict with another decision of the Court, *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987), which was not addressed in the opinion.

It is counsel's judgment that these grounds exist with regard to each of the following points of law and facts:

(A) In order to establish a prima facie case of unlawful employment discrimination sufficient to support court-ordered race-based hiring and promotions in the San Francisco Fire Department, the determination that females and minorities are underrepresented in the city and county's work force may not be based on an artificially defined population pool such as the residents of the city and county but instead must be based on the general population in the entire metropolitan bay area; and

(B) Because the district court had already granted relief eliminating the effects of past discrimination and prohibiting future discrimination in hiring and promotions in the San Francisco Fire Department, the affirmative race-conscious remedies approved by the Court were not necessary to remedy unlawful past discrimination but instead were designed and intended solely for the impermissible purpose of achieving and maintaining a balance between the percentage of females and minorities in all ranks of the fire department and the percentage

of females and minorities among residents of the city and county.

II. THE COURT ERRONEOUSLY CONCLUDES THAT A PRIMA FACIE CASE OF UNLAWFUL EMPLOYMENT DISCRIMINATION SUFFICIENT TO SUPPORT COURT-ORDERED RACE-BASED HIRING AND PROMOTIONS CAN BE ESTABLISHED BY A COMPARISON BETWEEN THE REPRESENTATION OF FEMALES AND MINORITIES IN THE WORK FORCE OF THE SAN FRANCISCO FIRE DEPARTMENT AND THE REPRESENTATION OF FEMALES AND MINORITIES AMONG RESIDENTS OF THE CITY AND COUNTY.

The first material point of law overlooked by the Court involves the issue of whether the race-based hiring and promotional provisions of the consent decree upheld on this appeal were supported by evidence sufficient to establish a *prima facie* case that the City and County of San Francisco has committed unlawful discrimination.

In order to establish a *prima facie* case of unlawful employment discrimination through the use of statistics showing that minorities are underrepresented in the employer's work force, the comparison that is the basis for those statistics may not be to an artificially defined population pool but rather must be to the "qualified" population in the relevant labor market. *See Wards Cove Packing Co. v. Atonio*, —— U.S. ——, 109 S.Ct. 2115, 2121-2122 (1989):

> It is clear to us that the Court of Appeals' acceptance of the comparison between the racial composition of the cannery work force and that of the noncannery work force, as probative of a prima facie case of disparate impact in the selection of the latter group of workers, was flawed for several reasons. Most obviously, with respect to the skilled noncannery jobs at issue here, the cannery work force

in no way reflected "the pool of qualified job applicants" or the "*qualified* population in the labor force."

See also Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) (District court must make findings that the labor market being used as the basis for statistical comparisons does not improperly include or exclude geographical areas with substantial numbers of qualified minorities); *Associated General Contractors of California, Inc. v. City and County of San Francisco, supra*, 813 F.2d 922, 934 (Affirmative action plan not justified by finding of San Francisco Board of Supervisors of past unlawful discrimination against minority enterprises in awards of municipal contracts because that finding was based solely on awards of contracts to firms within San Francisco rather than awards of contracts to the actual pool of available contractors, which included many firms outside the city's borders).

For positions such as police officer and firefighter, involving skills that the general population may possess, the relevant labor market is the general population in the actual geographic area from which the employer can reasonably be expected to recruit new employees and in which its current employees are likely to reside. *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1983, *en banc*) (District court properly disapproved consent decree in which quota hiring was based on a comparison of the number of black police officers employed by City of New Orleans to the percentage of black persons in the population of Orleans Parish rather than to the percentage of black persons in the Standard Metropolitan Statistical Area); *Hammon v. Barry*, 826 F.2d 73 (D.C. Cir. 1987) *den. rehear en banc, cert. denied* —— U.S. ——, 108 S.Ct. 2023 (1988) (District of Columbia Fire Department affirmative action plan held invalid because no imbalance existed between the percentage of blacks currently employed as firefighters and the

percentage of blacks in the entire District of Columbia metropolitan area).

> "[T]he percentage of blacks in the District's Fire Department is to be compared with the percentage of blacks in the area labor force. There should be no mistaking the correct benchmark in this case: the relevant labor force consists of persons 20 to 28 years of age in the *Washington metropolitan area*, not just within the confines of the Nation's capital.

Id., at 77.

Art. XI, § 10(b) of the California Constitution specifically forbids the City and County of San Francisco from restricting its labor force to city and county residents, and thus requires the city and county to hire and employ persons from the entire metropolitan bay area. *Cooperrider v. Civil Service Commission*, 97 Cal.App.3d 495 (1979).

It necessarily follows that with regard to employment in the San Francisco Fire Department, the relevant labor market is the Standard Metropolitan Statistical Area, which comprises the entire metropolitan San Francisco Bay area. *See EEOC v. Chicago Miniature Lamp Works* (N.D. Ill. 1985) 622 F.Supp. 1281, 1288-89:

> "Standard Metropolitan Statistical Area" ("SMSA") is a geographic area comprising a city having a population of 50,000 or more, the county in which the city is located and the outlying counties that have a high degree of economic and social integration with the nucleus.

As noted in the decision which the Court rendered in this appeal on December 4, 1989, the finding of the district court that the evidence in the record of this action was sufficient to establish a *prima facie* case of unlawful discrimination was not based upon a comparison of the representation of minorities in the work force of the

San Francisco Fire Department to the representation of minorities in the general population of the metropolitan bay area. Instead, that finding was based upon a comparison of the representation of females and minorities in the work force of the San Francisco Fire Department to the representation of females and minorities among residents of the City and County:

> The district court found that the statistical disparities between the numbers of minorities and women hired in the fire department and the numbers of minorities and women residing in the City constituted a "strong basis in evidence" sufficient to establish a *prima facie* case of past discrimination and justify the affirmative action provisions in the decree.

Slip Opinion, p. 14037.

The decision of this Court specifically affirmed this erroneous finding. Slip Opinion, p. 14038.

Because the decision of this Court has thus clearly overlooked the material point of law that a *prima facie* case of unlawful discrimination cannot properly be established on the basis of a comparison of the representation of females and minorities in the work force of the San Francisco Fire Department to the representation of females and minorities among residents of the city and county but instead must be based upon a comparison of the representation of females and minorities in the work force of the San Francisco Fire Department to the representation of females and minorities among residents of the entire metropolitan bay area, and because the decision of the Court on this point is in clear conflict with its decision in *Associated General Contractors of California, Inc. v. City and County of San Francisco, supra*, 813 F.2d 922, a rehearing should be granted and the decision of the district court on this point should be reversed.

III. THE DISTRICT COURT COMMITTED CLEAR ERROR BY APPROVING A CONSENT DECREE THAT WAS NOT NARROWLY TAILORED TO REMEDY PAST DISCRIMINATION BUT WAS INSTEAD DESIGNED TO ESTABLISH AND MAINTAIN A BALANCE BETWEEN THE REPRESENTATION OF FEMALES AND MINORITIES IN THE WORK FORCE OF THE SAN FRANCISCO FIRE DEPARTMENT AND THE REPRESENTATION OF FEMALES AND MINORITIES AMONG RESIDENTS OF THE CITY AND COUNTY.

A rehearing should also be granted because the Court has overlooked material points of fact and law which clearly demonstrate that the consent decree should be overturned because it was not narrowly tailored to remedy past unlawful discrimination but instead was designed to establish and maintain a representation of females and minorities in all ranks of the San Francisco Fire Department in proportion to the number of females and minorities among residents of the city and county.

Affirmative race-conscious relief may only be imposed by the courts when there is no other effective way to ensure the full enjoyment of rights protected by Title VII of the Civil Rights Act of 1964. *Local 28 of Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421, 448-453 (1986). Such relief may never be adopted solely for the purpose of correcting a racially imbalanced work force, is only appropriate when other, race-neutral remedies have proven ineffective, and must be narrowly tailored to the specific employment practices that have been found unlawful. *Id.* at 448-449; *United States v. Paradise*, 480 U.S. 149, 166-177 (1987).

No one denies that unlawful discrimination has occurred in hiring and promotions in the San Francisco Fire Department.

However, as this Court noted in its decision of December 4, 1989, prior relief for the City's unlawful past discrimination had been granted by the district court in *Western Addition Community Org. (WACO) v. Alioto*, 330 F. Supp. 536 (N.D. Cal. 1971), and 369 F. Supp. 77 (N.D. Cal. 1973), *appeal dismissed as moot*, 515 F.2d 542 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 1014 (1975). Slip Opinion at p. 14036.

In addition to the relief granted in *WACO*, further relief had been granted by the district court in the course of this action in order to remedy unlawful discrimination committed by the City after the expiration of the *WACO* consent decree in 1982. That relief, however, was not taken into account in this Court's discussion of whether the affirmative race-conscious provisions of the consent decree that was approved by the district court in this action on June 10, 1988, were necessary to remedy unlawful past discrimination or were instead designed solely to correct a racially imbalanced work force.

When that further relief is taken into account, it becomes clear that the affirmative race-conscious provisions of the consent decree were not necessary to remedy unlawful past discrimination that remained uncorrected but instead were designed solely to establish and maintain a representation of females and minorities in all ranks of the San Francisco Fire Department in proportion to the number of females and minorities among residents of the city and county.

In this regard, the district court issued an order in this action on February 26, 1987, granting a motion of the United States for partial summary judgment after the City had abandoned an entry-level examination that it had administered in 1982-1983 and promotional examinations that it had administered in 1984 for the ranks of lieutenant and fire inspector. *United States v. City and County of San Francisco*, 656 F.Supp. 276 (N.D. Cal. 1987).

This order of February 26, 1987, required the City to develop new entry-level and promotional selection procedures that were valid and nondiscriminatory and permanently enjoined the city and county from committing any further violations of Title VII of the Civil Rights Act of 1964. *Id.* at 289-291.

In this same order, the district court required the City to hire its first female firefighters. *Id.*, at 292.

The district court also directed the City to maintain an extensive program of recruitment and training directed at increasing the number of qualified Black, Hispanic, Asian and female applicants for firefighter positions. *Id.*, at 290.

The district court specifically recognized in its order of February 26, 1987, that the City's abandonment of the 1982-83 entry-level examination and the 1984 promotional examinations eliminated any claim by the females and minorities who took those examinations that they had been denied individual employment opportunities in violation of Title VII.

> On a record limited only to the bare fact that the City administered and then cancelled, prior to hiring, certain invalid examinations, the court, as a matter of law cannot find a discriminatory denial of individual employment opportunities violative of Title VII.

Id., at 285, n.7.

The district court also stated that the record before it at that time did not justify "affirmative relief" or any other remedy beyond the permanent injunctive relief and interim hiring provisions set forth in its order. *Id.*, at 289.

With the sole exception of a decision by the California Court of Appeal that a job-related promotional examination administered by the City in 1978 had nevertheless

unlawfully discriminated against black candidates because that examination had failed to test for supervisory skills and abilities (*City and County of San Francisco v. Fair Employment & Housing Com.*, 191 Cal.App.3d 976 (1987)), no new evidence of unlawful discrimination was presented to the district court between the entry of the order of February 26, 1987, and the submission of the consent decree to the district court for approval on November 12, 1987.

No entry-level or promotional examinations were given by the city and county during this period, hence there was no evidence that the city and county had resisted or purposely failed to comply with the requirement of the February 26, 1987 order that it administer entry-level and promotional examinations that are valid and nondiscriminatory.

Accordingly, since the district court had specifically recognized in its order of February 26, 1987, that there was no evidence in the record at that time to support the imposition of "affirmative relief," the only evidence in the record at the "fairness hearing" on December 22, 1987 to support race-conscious relief was the occurrence of discrimination against Black candidates in the 1978 examination for lieutenant.

While this evidence might justify a consent decree providing affirmative relief to Black persons who took that particular examination, the requirement that affirmative race-conscious remedies be narrowly tailored to the specific employment practice that has been found unlawful forecloses the use of this evidence to support affirmative race-conscious relief for Black persons who took other promotional examinations, or for females or other minorities, whether such persons were applicants or current employees. However, the district court approved a consent decree which not only provided affirmative, race-conscious relief to the 6 Black persons who had taken the 1978 promotional examination for the rank of lieutenant (*United States v. City and County of San Fran-*

cisco, 696 F. Supp. 1287, 1299 (N.D. Cal. 1988)) but also required the city and county to immediately promote 11 Black, 8 Hispanic, and 8 Asian or Filipino firefighters who had taken the abandoned 1984 promotional examination for the rank of lieutenant and permitted the city to promote 5 additional Black firefighters, 5 additional Hispanic firefighters, and 2 additional Asian or Filipino firefighters from among the participants in that examination. *Id.*, at 1299-1300.

The purpose and effect of these additional promotions of minorities who had participated in the 1984 examination for the rank of lieutenant was to place Black, Hispanic, and Asian or Filipino employees in that rank slightly in excess of the percentages of Black, Hispanic, and Asian or Filipino employees in the entire department.

In addition to these additional minority promotions, the consent decree established a "goal" that the city and county would promote minorities and women during the seven (7) year term of the decree in proportion to their representation in the participant pool for each promotional examination. *Id.*, at 1299-1300.

The consent decree also provided that the city and county was to hire at least 500 entry-level firefighters during the term of the decree, and established the "goals" that 40% of these new employees were to be minorities and 10% were to be women. *Id.*

Any failure by the city and county to meet its hiring and promotional goals could only be justified by proof that the city's selection procedures were valid under the *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607.1 *et seq.* *United States v. City and County of San Francisco*, *supra*, 696 F. Supp. 1287, 1313.

Because the district court's order of February 26, 1987, had not only remedied all past unlawful discrimination by the city and county other than the discriminatory im-

pact of the 1978 promotional examination for the rank of lieutenant upon Black candidates but had also permanently enjoined the city and county from committing any future unlawful discrimination, it necessarily follows that the foregoing affirmative race-conscious hiring and promotional requirements were not necessary to remedy unlawful past discrimination that remained uncorrected but instead were designed solely to establish and maintain a representation of females and minorities in all ranks of the San Francisco Fire Department in proportion to the number of females and minorities among residents of the city and county.

This fact is confirmed by the decree itself, which expressly states that its goal is to raise the minority representation of the sworn personnel of the Fire Department to forty percent (40%) and the female representation to ten percent (10%) in order that the minority and female composition of the San Francisco Fire Department "more nearly reflects the racial, ethnic, and sexual composition of the relevant labor force of the City and County of San Francisco." *Id.*, at 1313.

The decision rendered by this Court on December 4, 1989, erroneously concludes, however, that the decree is consistent nevertheless with the specific instructions given by the Supreme Court in *Local 28 of Sheet Metal Workers v. E.E.O.C.*, *supra*, 478 U.S. 421 and *United States v. Paradise*, *supra*, 480 U.S. 149, that affirmative race-conscious relief may only be imposed by the courts when there is no other effective way to ensure the full enjoyment of rights protected by Title VII of the Civil Rights Act of 1964, when other, race-neutral remedies have proven ineffective, when such relief is narrowly tailored to the specific employment practices that have been found unlawful, and when it is clear that the purpose of such relief is not solely to correct a racially imbalanced work force:

> The present case presents a fact situation similar to *Paradise*, but involves a voluntary consent decree. The district court has ordered the hiring of minorities and women in percentages equal to their representation in the labor market—the City and County of San Francisco—and the promotion of minorities and women in percentages equal to their representation in the relevant labor market—the fire department. The decree does not, however, contain any provision to stop the use of its promotion mechanism when its valid promotion objectives have been met. To ensure that the result of the hiring and promotional procedures does not become unreasonable, we modify the seven-year duration of the decree to seven years or sooner upon the accomplishment of the objectives or the goals of the consent decree.

Slip opinion, p. 14039.

Moreover, it is simply not true that the facts presented here are similar to those in *Paradise*.

In *Paradise*, affirmative race-conscious remedies were imposed "upon a defendant with a consistent history of resistance to the District Court's orders, and only *after* the Department failed to live up to its court-approved commitments." *United States v. Paradise*, *supra*, 480 U.S. at 170-171.

Here, on the other hand, the affirmative race-conscious remedies of the consent decree were imposed upon the City and County of San Francisco before it had any opportunity to develop and administer the entry-level and promotional examinations which it was required to develop and administer under the district court's order of February 26, 1987.

There was thus no evidence upon which the district court could conclude that the city and county had either resisted or purposely failed to live up to its court-approved commitments.

In addition, in *Paradise* the promotional quotas imposed for the upper ranks of the work force were only to remain in effect while there were qualified black candidates, the rank at issue was less than 25% black, and the employer had not developed and implemented a promotion plan without adverse impact for that rank. *Id.*, 480 U.S. at 163.

Here, on the other hand, promotions to the upper ranks in the work force are subject to limitations and restrictions which remain in effect regardless of whether the city and county administers nondiscriminatory promotional examinations.

For example, paragraph 13(e) of the consent decree prohibits the city and county from administering a promotional examination for the rank of battalion chief until such time as there are at least 10 Blacks holding the permanent rank of captain or above. (CR 695:14). Paragraph 13(d) prohibits the city and county from administering a promotional examination for the rank of lieutenant until 10 months after the graduation from the Fire College of at least 90 firefighters hired pursuant to the decree. (CR 695:13).

All of these facts, which were overlooked in the decision which the Court rendered in this appeal on December 4, 1989, make clear that the district court's order of February 26, 1987, constituted an adequate remedy for any unlawful discrimination committed by the City after the expiration of the *WACO* consent decree. The only purpose actually to be accomplished by the consent decree that was approved by the district court in this action on June 10, 1988, was to eliminate an underrepresentation of minorities and women in the workforce of the San Francisco Fire Department. A rehearing should therefore be granted and the decision of the district court on this point should be reversed.

IV. SUGGESTION FOR REHEARING EN BANC

As shown above, the decision which the Court has rendered in this appeal is in clear conflict with another decision of the Court, involves questions that have been the subject of several recent decisions of the Supreme Court, and directly conflicts with existing decisions of other courts of appeals on matters in which there is an overriding need for national uniformity. Defendant-Intervenor-Appellant Local 798 therefore suggests this petition for rehearing is appropriate for consideration en banc.

Dated: December 18, 1989

DAVIS, RENO & COURTNEY

By /s/ _____

DUANE W. RENO
Attorney for Local 798

PROOF OF SERVICE BY MAIL

I declare that I am over the age of eighteen, not a party to the within action and that my business address is 90 New Montgomery Street, Suite 909, San Francisco, CA 94105.

On December 18, 1989 I served the within PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC on the following party(s) by placing a true copy thereof in the U.S. mail at San Francisco, California, fully posted and addressed as follows:

See Attachment A

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed at San Francisco, California on this 18th day of December 1989.

/s/ Grania B. Duffy
GRANIA B. DUFFY

ATTACHMENT A

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